Supreme Court, U. S.
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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6293

PHILIP J. GOLDBERG,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 3, 1975
CERTIORARI GRANTED JUNE 16, 1975

Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

CR-70-517 PHX.
COPPLE

THE UNITED STATES

vs.

PHILIP J. GOLDBERG
EDWIN S. NEWMAN
EMIL TUCKER
WILLIAM MILES SKILLMAN and
ROBERT STANLEY CLARK

DATE	PROCEEDINGS
1970	
Oct. 15	1. File Indictment (17 cts)
Oct. 15	— Minute entry: It is ordered that a B/W be issued as to all defts and bonds set in the amt. of $10,000 respectively.
Oct. 15	— Issue B/W in dup. as to all defts to marshal.
Oct. 20	— Minute entry; Defts Goldberg and Newman having posted bonds, it is ordered that a summons be issued as to these two defts only returnable on 11/9/70 at 12:00 noon in ctrm #3.
Oct. 20	— Issue Summons as to defts. Goldberg and Newman only to marshal.
Oct. 21	— Minute entry: Deft. Emil Tucker having posted bond, it is ordered that a summons be issued as to said deft. returnable on 11/9/70 at 12:00 noon in ctrm #3.
Oct. 21	— Issue summons as to deft. Tucker to marshal.

DATE	PROCEEDINGS

1970

Oct. 23 — Minute entry: Deft. Wm. Skillman having posted bond, it is ordered that a summons be issued as to deft. Skillman returnable on 11/9/70 at 12:00 noon in ctrm #3.

Oct.23 — Issue summons to marshal in trip. re deft. Skillman.

Oct. 26 2. File appearance of atty James La Rossa (by Gerald Shargel) as atty for deft. Emil Tucker.

Oct. 26 — Minute entry: On for arraignment as to deft. Emil Tucker. J. Jenckes pres. for Govt. Deft. Tucker pres. in person and with counsel Gerald Shargel. Deft. arraigned and pleads not guilty to cts he is charged in in the Ind. Order pass for trial setting at a later date and deft. allowed 60 days to file any motions. Deft. to remain on present bond.

Oct. 30 3. File summons returned executed by certified mail as to Deft. Skillman.

Oct. 30 4. File summons returned executed as to deft. Newman.

Nov. 9 5. File appearance of Kenneth Simon as atty for deft. Skillman.

Nov. 9 6. File appearance of Eugene Trope as atty for deft. Goldberg.

Nov. 9 7. File application for limited admission of practice of atty Simon and ORDER thereon.

Nov. 9 — Minute entry: On for arraignment as to defts Goldberg, Newman and Skillman. J. Jenckes pres. for Govt. Deft. Goldberg pres and with counsel E. Trope. Deft. Skillman pres. and with counsel K. Simon. Deft. Newman pres and with counsel M. Ploscowe. Ea. deft. arraigned and pleads not guilty as charged. Order pass for trial setting at a later date and ea. counsel allowed to Feb. 1, 1971 to file any motions. Ea. deft. to remain on present bonds.

DATE	PROCEEDINGS

1970

Nov. 9 8. File Waiver of right to be present at all proceedings prior to trial by Deft. Emil Tucker.

Nov. 12 9. File application for limited admission of Eugene L. Trope and ORDER thereon.

Nov. 13 10. File Commissioner's record of proceedings as to deft. Wm. M. Skillman, from Western Dist. of Missouri at Kansas City, and $10,000 bond (10% cash posted).

Nov. 16 — Minute entry: On for arraignment as to deft. Robert Stanley Clark. T. Crowe pres. for Govt. Deft. Clark pres. in person and without counsel. Deft. states to the Court that he will obtain counsel. Order this case be con't for arraign. as to deft. Clark until 11/23/70 at 12:00 noon.

Nov. 16 11. File appearance of atty Henry Florence as counsel for Deft. Robert S. Clark.

Nov. 16 12. File Bail reform Act Form No. 1 as to deft. Clark.

Nov. 16 13. Enter and file order specifying methods and conditions of release as to deft. Robert Stanley Clark.

Nov. 23 — Minute entry: On for arraignment as to deft. Robert S. Clark. J. Jenckes pres. for Govt. Deft. Clark pres. and with counsel Henry Florence. Deft. arraigned and pleads not guilty to cts charged in the Indictment. Order pass for trial setting at a later date and counsel allowed to 2/1/70 to file any motions.

Dec. 10. 14. File B/W returned executed as to deft. Robert Stanley Clark.

Dec. 28 15. File Motion of deft. Emil Tucker for Discovery and Inspection, Bill of Particulars, set for hearing 1/11/71 at 11:00 a.m. in ctrm #3.

1971

Jan. 7 16. File Stipulation that deft Tucker's motions set for 1/11/71 are vacated.

DATE	PROCEEDINGS

1971

Jan. 22 17. File stip. for continuance re time of filing motions as to deft. Goldberg from 2/1/71 to 4/1/71 and ORDER thereon. (per phone conversation with J. Jenckes this date, as to all defts of record and Mr. Jenckes mailed copies of order of continuance to all counsel of record).

Jan. 27 18. File stip. that deft. Edwin S. Newman may have an extension of time within which to file any motions until 4/2/71, and ORDER thereon.

Feb. 16 19. File motion of Fred R. Esser to withdraw as counsel of record for deft. Wm. Miles Skillman, said motion set for hearing at 11:00 a.m. on 3/15/71 in ctrm #3.

Mar. 8 20. File return on B/W executed as to deft. Edwin S. Newman.

Mar. 15 — Minute entry: in chambers. Fred Esser pres. on behalf of deft. Skillman. no other appearances. Order motion to with draw as local counsel granted. (Mr. Simon notified in Missouri of ruling and also sent new form for limited admission and copy of local Rule #6).

Mar. 21 21. File Stip. for continuance on behalf of deft. Philip Goldberg and ORDER thereon allowing until May 1, 1971 to file any motions.

Mar. 30 — Minute entry: On for change of plea as to deft. Tucker. J. Jenckes pres. for Govt. Deft. Tucker pres. and with counsel G. Shargel. Deft. Tucker changes plea to guilty to ct 2. Deft. waives time for sentencing.

Mar. 30 22. Enter and file Judgment and Commitment as to deft Tucker: 5 yrs. impr. as to ct 2. It is further ordered that said sentence to commence on April 5, 1971 and to be served concurrently with sentence imposed in case No. 6573-CD, Los Angeles, Calif. It is further ordered that counts 1 and 3 thru 17 be dismissed and deft's bond be exonerated.

Mar. 30 — Issue cc to marshal and prob. and mailed a copy of Judgment to deft. Tucker's atty, to be forwarded to bonding company (of which this file has no record).

DATE	PROCEEDINGS

1971

Apr. 8 23. File motion of counsel, Henry Florence, for leave to withdraw as counsel for deft. Robert Stanley Clark, set for hearing 4/19/71 at 11:00 a.m.

Apr. 19 — Minute entry: On for hearing re motion of H. Florence to withdraw as counsel for Deft. Robert Stanley Clark. J. Jenckes pres. for Govt. H. Florence pres. on behalf of deft. Clark. Deft. Clark not present. It is ordered that this motion be vacated.

Apr. 23 24. File Judgment and Commitment returned executed as to deft. Emil Tucker.

Apr. 27 25. File stipulation for continuance on behalf of deft. Goldberg and ORDER thereon, allowing time to file motions be extended to Aug. 1, 1971.

May 13 26. File Motion of Govt. to vacate conditional release and issuance of a B/W as to deft. Clark and ORDER THEREON.

July 19 27. File motion of deft. Tucker for modification of sentence, set for hearing 7/16/71 at 10:00 a.m. in ctrm #3.

July 19 28. Enter and file order modifying sentence of deft. Emil Tucker to read: that said deft. be committed to the custody of the Attorney General for a max. period of 5 yrs pur. to 18:4208(a) (2).

July 19 — Copies of the foregoing order mailed to U.S. Atty, U.S. Marshal, Atty for deft. Tucker and probation office.

Sept. 1 29. File motion of Deft. Goldberg for transfer from the District for trial on ground of prejudice.

Sept. 1 30. File notice of motion, by deft. Goldberg, to inspect grand jury minutes, directing the production of certain papers and directing the service of a bill of particulars set for hearing at 11:00 a.m. on Oct. 11, 1971 in Ctrm #3.

DATE	PROCEEDINGS
1971	
Sept. 14	31. File motion to dismiss the indictment or in the alternative for severance set for hearing 10/18/71 at 11:00 a.m. in ctrm #3. (re Deft. Goldberg).
Sept. 14	32. File contentions of counsel in support of motions to dismiss Indictment, or transfer from the district, or in the alternative of severance and a separate trial. (re Deft. Goldberg)
Sept. 14	33. File affidavit in support of motion to dismiss indictment or in the alternative for severance and a separate trial of deft. Goldberg.
Oct. 6	— Minute entry: The Court today ordered that motions numbered 29, 30, 31 are to be heard on Nov. 15, 1971 at 11:00 a.m. (J. Jenckes, F. Esser and E. Trope notified).
Oct. 12	34. File motion of deft. Newman for severance of defts.
Oct. 12	35. File motion of Deft. Newman for production, copying and photographing.
Oct. 12	36. File motion of deft. Newman for inspection, copying and photographing.
Oct. 12	37. File motion of deft. Newman for a change of venue.
Oct. 19	38. File notice of hearing on deft Newman's motion for severance, change of venue and motion for inspection, copying & photographing set for hearing 11/15/71 at 11:00 a.m. in ctrm #3.
Nov. 4	39. File memorandum of law in support of motions on behalf of deft. Goldberg.
Nov. 10	40. File motion of Deft. Goldberg for inspection, copying and photographing.
Nov. 10	41. File Motion of deft. Goldberg for production, copying and photographing.

DATE	PROCEEDINGS
1971	
Nov. 11	42. File Govt's response to defts Goldberg's and Newman's various motions.
Nov. 15	— Minute entry: Motions nos. 29, 30, 31, 40, 41, 34, 35, 36, & 37 on for hearing. J. Jenckes pres. for Govt. Eugene Trope and Fred Esser pres. for Deft. Goldberg. Deft. Goldberg not present. T. Galbraith pres. on behalf of Deft. Newman. Deft. Newman not present. It is ordered that all motions are denied. A preliminary pre-trial conference to be held at a later date. (to be set by Court).
Dec. 17	43. Enter and file Order that on or before May 1, 1972 Govt will furnish to counsel for defts copies of all documentary evidence, etc. that counsel will meet with Court for pretrial conference at 2:00 p.m. on 5/15/72, etc. and further ordered that this case is set for trial with a jury commencing at 9:30 a.m. on 6/13/72 in ctrm #3.
Dec. 17	— Mailed copy of the foregoing order to U.S. Atty. Fred Esser, H. Florence, A. Schwartz, M. Ploscowe and Ronald Fischetti, J. Flynn, Eugene Trope, K. Simon.
1972	
Jan. 17	44. File certified copy of Order to Transfer Cash Bail as to Deft. Skillman, received from Clerk, U.S. Dist. Court, W. Dist. of Missouri, Kansas City, Missouri, together within Clerk's check #1,555 in sum of $1,000 representing 10% of $10,000 bond on Deft. SKILLMAN.
Jan. 17	— Deposit $1,000 in Reg. Fund as 10% of $10,000 bond of deft. Skillman (Doc. #10).
Feb. 17	45. File consent to transfer of case for plea and sentence under R.20 as to Deft. William Miles Skillman.
Feb. 18	46. Enter and file order to transfer deft Skillman's $1,000 cash bail.
Feb. 18	— Disburse $1,000 to Clerk, U.S. District Court, Western Dist. of Missouri, as transfer of deft. Skillman's 10% cash bail, Order of 2/18/72 ck #3,140.

DATE	PROCEEDINGS

1972

Feb. 18 — Mailed this day to Clerk, U.S. Dist. Court, Western Dist. of Missouri, under R.20 as to deft. Skillman, certified copy of the Indictment and order transferring deft's cash bail, originals of deft's bond, bail reform act No. check in amt. of $1,000.00 and deft's consent to transfer case for plea and sentence together with JS-3 card.

Feb. 23 47. File reporter's transcript of plea and sentencing proceedings held 3/30/71 as to deft. Emil Tucker. Certified copy.

Mar. 16 48a. Enter & file Order resetting case for Jury trial 7/11/72 @ 9:30. (counsel notified)

Apr. 5 48. Enter and file order that the pretrial conference set for 5/15/72 is vacated and reset for pretrial at 2:00 on 6/26/72.

Apr. 5 — Mailed copy of the foregoing order to U.S. Atty, E. Trope, J. Flynn and H. Florence.

Apr. 12 49. File substitution of attorneys, notice and consent to the substitution and that Philip J. Goldberg will represent himself.

Apr. 12 50. File motion for determination of counsel by Govt.

Apr. 12 51. Enter and file order that Govt's motion for determination of counsel will be heard on Apr. 24, 1972 at 12:00 noon in ctrm #3. (U.S. Atty mailed copies of the foregoing order to Eugene Trope and had one personally served on Philip Goldberg).

Apr. 24 — Minute entry: Motion of counsel to withdraw on for hearing. J. Jenckes pres. for Govt. Deft. Goldberg pres. and with counsel E. Trope and local counsel Fred Esser. Order counsel E. Trope and F. Esser allowed to withdraw and deft. Goldberg may proceed pro se.

May 9 52. File reporter's transcripts, USA vs. Emil Tucker, of plea and sentencing proceedings had on March 30, 1971 (original and two copies) See Docket #47.

DATE	PROCEEDINGS

1972

May 12 — Minute entry: Record on appeal in Civil 72-82 Phx. re Emil Tucker, petitioner vs. United States of America transmitted to 9th Cir., San Francisco, Calif. this date. (2255 appeal).

May 30 53. File substitution of attorneys and notice of appearance of Donald C. Smaltz as atty for deft. Philip Goldberg.

May 30 54. File waiver of deft Goldberg's presence under Rule 43.

June 5 55. File stipulation for continuance of pretrial conference and ORDER thereon.

June 5 56. Enter and file order that the pretrial conference scheduled for 6/26/72 is vacated and reset for Oct. 30, 1972 and that the trial prev. set for July 11, 1972 is reset for November 28, 1972.

June 5 — Mailed copy of the foregoing order to U.S. Atty, Donald S. Smaltz, John Flynn, and Henry Florence.

Oct. 6 57. File Appearance of Thomas H. Coleman, counsel for deft. Goldberg.

Oct. 6 — Minute entry: Hearing on return on subpoenas, etc. J. Jenckes pres. for Govt. Thomas H. Coleman present on behalf of deft. Coleman. Other attys present are Mr. Cavanagh, Mr. Hing, Mr. Weiner and Tom Galbraith. Upon agreement of counsel, it is ordered that subpoenas as to Mr. Herbert Finn, Mr. Romley, Mr. Shaw and Arizona Insurance Commission be quashed (these people have complied with said subpoenas). Oral motions of attys Cavanagh, Hing and Weiner to quash subpoenas are taken under advisement and said counsel to file supporting memo. as to said motions by the 13th of Oct., Mr. Coleman to reply by the 20th of Oct. and Cavanagh, Hing and Weiner to respond by the 25th of Oct. It is furtherordered that counsel for Govt. to file memo. by the 25th of Oct.

DATE	PROCEEDINGS
1972	
Oct. 10	58. File motion of deft. Robert O. Hing to quash subpoena duces tecum and supporting memorandum.
Oct. 11	59. Enter and file memorandum to counsel in connection with the pending motions of attys Harry Cavanaugh, Robert Hing and Sid Weiner to quash Rule 17(c) subpoenas served by deft. Goldberg and the obligation of the Court to secure full, fair and expeditious trial of criminal matters attention of counsel is called to the case of United States v. Moore, 368 F.2d 990 (9th Cir. 1966). The Clerk will send copies of this memorandum to the three attys named above and to counsel of record in this case.
Oct. 11	— Notice mailed to counsel re above memo. and Order.
Oct. 13	60. File motion of Sidney B. Weiner to quash subpoena, etc.
Oct. 16	— Minute entry: On for determination of counsel as to deft. Clark. P. Whitehead pres. for Govt. Deft. Clark pres. and with counsel H. Florence. It is ordered that motion of H. Florence, filed on 4/8/71 (docket #23) to withdraw as counsel for deft. Clark is granted. Deft. Clark states to the Court that he is retaining Mr. David S. McCord of Dallas, Texas, as counsel. Order this matter be con't until 10/24/72 at 12:15 p.m.
Oct. 20	61. File memorandum of points and authorities in opposition to motions to quash subpoena decus tecum and affidavit of Philip J. Goldberg.
Oct. 20	62. File transcript of proceedings held 10/6/72.
Oct. 20	63. File motion for continuance of trial date, set for hearing at 12:15 p.m. on 11/3/72.
Oct. 24	— Minute entry: On for determination of counsel as to deft. Clark, T. Crowe pres. for Govt. no appearance of deft. or counsel. Order matter be con't until 10/30/72 at 12:00 noon.
Oct. 26	64. Enter and file order that the pretrial scheduled for 10/30/72 is vacated.

DATE	PROCEEDINGS
1972	
Oct. 26	— Mailed copy of the foregoing order to U.S. Atty, T. Coleman, D. McCord and J. Flynn.
Oct. 30	65. File reply of Sidney Weiner to memo. of points and authorities in opposition to motion to quash subpoena duces tecum.
Oct. 30	— Minute entry: On for determination of counsel as to deft. Clark. J. Jenckes pres. for Govt. Deft. Clark pres. and with counsel David McCord. Atty McCord is advised of status of case and he confirmed that he is counsel of record for deft. Clark.
Nov. 1	66. File Deft. Goldberg's response in opposition to Govt's motion for continuance of trial.
Nov. 3	— Minute entry: Govt's motion for continuance of trial on for hearing. J. Jenckes pres. for Govt. D. Smaltz pres. on behalf of deft. Goldberg. Order motion granted and trial of 11/28/72 is vacated and reset for trial, with a jury, at 9:30 a.m. on 2/20/73 (about 4 weeks set aside).
Nov. 3	— Mailed copy of minute entry re the above to J. Jenckes, Donald Smaltz, J. Flynn, D. McCord, P. Goldberg and E. Newman.
Dec. 8	67. Enter and file Memo. and ORDER that Rule 17(c) subpoenas are quashed; at a time agreeable to counsel, but not later than 1/10/73, Sidney Weiner and Robert Hing will make available to counsel for deft. Goldberg all deft's files in their possession, etc.
Dec. 8	— Mailed cc re above order to J. Jenckes, Sidney Weiner, Robert Hing and counsel for deft. Goldberg.
Dec. 21	68. File motion to reduce amount of appearance bond as to deft. Clark.
Dec. 21	— Minute entry: On for bail review hearing. J. Jenckes pres. for Govt. Deft. Clark pres. and with counsel David McCord. Order bail reduced to $10,000 (from $50,000 set by Mag. is Florida) with a 10% deposit.

DATE	PROCEEDINGS

1972

Dec. 21 69. File Bail Reform Act Form No. 2 as to Deft. Robert Stanley Clark.

Dec. 21 70. File Appearance Bond for Robert Stanley Clark in amt. of $10,000.00. Deposit in Reg. Fund. $1,000.00, 10%, posted by Robert Stanley Clark.

Dec. 22 71. File record of proceedings held before the mag. as to Deft. Clark re bail.

1973

Jan. 3 — Minute entry: On for change of plea as to deft. Robert Stanley Clark. J. Jenckes pres. for Govt. Deft. Clark pres. and with counsel D. McCord. Deft. pleads guilty to ct 3. Order pass for sentencing until 3/12/73 at 12:30 pm. and for dismissal as to other remaining cts and further that the trial date as to this deft. is vacated.

Jan. 15 72. File application of deft. Goldberg for order to show cause re contempt of Sidney B. Weiner.

Jan. 15 73. File affidavit of Geo. Nazarian re contempt.

Jan. 15 74. Enter and file Order to show cause re contempt of Sidney B. Weiner

Jan. 15 75. File notice and motion to amend Court order, set for 1/22/73 at 11:00 a.m. (re Court's order of 12/8/72 to include Harry Cavanagh).

Jan. 15 — Copies of documents nos. 72, 73 and 74 delivered to marshal for service.

Jan. 18 76. File petition for writ of habeas corpus ad testificandum re deft. Skillman.

Jan. 18 77. Enter and file order for writ of issue re deft. Skillman.

Jan. 18 — Issue writ to marshal in dup.

DATE	PROCEEDINGS

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Jan. 22 — Minute entry: Motion to amend order of Dec. 8, 1972 to include Harry J. Cavanagh and Order to show cause re contempt of Sidney Weiner. J. Jenckes pres. for Govt. Geo. Nazarian pres. on behalf of deft. Goldberg, Harry Cavanagh pres. pro per. Order motion to amend order re Harry Cavanagh granted and Order to show cause re contempt of Sidney Weiner con't until 3:00 p.m. this date. Sub. at 3:00 p.m. present are Geo. Nazarian, Sheldon Mitchell and Sidney Weiner. Order contempt re Sidney Weiner be con't until 11:00 a.m. on 1/29/73.

Jan. 29 — Minute entry: Order to show cause re contempt of Sidney Weiner on for hearing, Geo. Nazarian pres. for Deft. Goldberg. T. Crowe pres. for Govt. No other appearances. Affidavit is now filed by Geo. Nazarian. It is ordered that a summons be issued, personally by marshal, to Sidney Weiner and a copy to be delivered to Sheldon Mitchell, to appear at 2:00 p.m. in ctrm #3 this date, re contempt hearing.

Jan. 29 — Issue summons to marshal in dup., plus one copy of Sheldon Mitchell, along with special instructions to the marshal.

Jan. 29 78. File affidavit of George Nazarian.

Jan. 29 79. File summons returned, executed by marshal, as to Sidney Weiner.

Jan. 29 80. File motion of Deft. Goldberg for continuance of trial date.

Jan. 29 — Minute entry: Continuation of 11:00 a.m. hearing this date. Sub., at 2:00 p.m. present are Geo. Nazarian, Sidney B. Weiner and Sheldon Mitchell. Witnesses, Sidney Weiner, Jack L. Helfinger and Geo. Nazarian sworn and exam. The Court advised Mr. Nazarian, that if deft. Goldberg wanted information from the files of Sidney Weiner, that he would have to pay the salary of clerical employment from Weiner's office, micro film documents for preservation of files, and costs to be borne by Mr. Goldberg in ad-

DATE	PROCEEDINGS

1973

vance. In re contempt of Sidney B. Weiner, it is ordered that this matter is held in abeyance at this time.

Jan. 29 81. Enter and file order that the trial set for 2/20/73 is vacated and the matter is reset for jury trial commencing at 9:30 a.m. on May 15, 1973.

Jan. 29 — Mailed cc re above order to U.S. Atty, Geo. Nazarian, J. Flynn, Defts. Goldberg and Newman.

Feb. 1 82. File respondent's proposed mechanics to facilitate inspection of documents (Sheldon Mitchel on behalf of Sidney Weiner).

Feb. 20 83. File motion to discharge and vacate order to show cause re contempt of Sidney B. Weiner (no oral argument requested).

Feb. 23 84. File Deft Goldberg's intention to file proposal re inspection of documents.

Feb. 28 — Minute entry: Per request of J. Jenckes, the Court today ordered that sentencing be con't until further notice as to deft. Robert Clark.

Feb. 28 — Issue cc re above minute entry to J. Jenckes, D. McCord and Deft. Clark.

Mar. 12 85. File notice of motion, and motion for leave to withdraw as counsel for deft. Goldberg. (this document to be sealed), set for hearing at 12:15 p.m. on 3/15/73. (counsel notified by phone re hearing time and date).

Mar. 13 86. File Govt's response to motion of Deft. Goldberg's counsel to withdraw and Attached order thereon requesting that deft. Goldberg attend hearing set for 12:15 p.m. on 3/15/73 re withdrawal of counsel (J. Jenckes called and advised Goldberg and atty Smaltz of this order).

Mar. 15 — Minute entry: Motion for leave to withdraw as counsel for deft. Goldberg, on for hearing. J. Jenckes pres. for Govt. Deft. Goldberg pres. and with counsel Donald Smaltz and Geo. Nazarian. Order motion denied and case

DATE	PROCEEDINGS

1973

will proceed to trial as scheduled. It is further ordered, that upon respresentation to the Court that deft. Goldberg is without sufficient funds to continue retaining said counsel, that attys Donald Smaltz and Geo. Nazarian are hereby appointed, under the criminal justice act, to continue their representation of deft. Goldberg.

Mar. 16 87. File reporter's transcript of hearing on motion for leave to withdraw as counsel for deft. Goldberg.

Apr. 17 88. File petition for writ of habeas corpus ad testificandum re deft. Skillman.

Apr. 17 89. Enter and file order for writ to issue re deft. Skillman.

Apr. 17 — Issue writ to marshal.

Apr. 30 90. File motion of Goldberg re hearing on present of unauthorized persons at Grand Jury proceedings, etc.

Apr. 30 91. Lodge order for hearing re presence of unauthorized persons at grand jury proceedings, production of witnesses and documents, set for hearing at 3:00 p.m. on 5/7/73 in ctrm #3.

Apr. 30 — cc re the above mailed to Geo. Nazarian and J. Jenckes.

May 7 — Minute entry: Hearing re presence of unauthorized persons at Grand Jury proceedings. Witnesses W. G. Trexler, Jr., D. C. Marshall, Millard Humphrey and J. Jenckes sworn and exam. Order motion re this hearing is denied and counsel for deft. Goldberg to file, by 5/11/73, any other motions and further that counsel file with the Court by 5/14/73 any proposed jury voir dire questions & during course of trial & as soon as possible counsel to file proposed jury instructions with the Court.

May 7 92. File financial affidavit pur. to CJA #23 as to deft. Goldberg and ordered sealed until further notice by the Court.

DATE	PROCEEDINGS

1973

May 9 93. File motion to dismiss the Indictment on behalf of deft. Newman.

May 9 94. File motion of deft. Newman for severance.

May 9 95. File notice of hearing motions of deft. Newman set for hearing at 11:00 a.m. on May 10, 1973.

May 10 96. File response to motion to sever and motion to dismiss the Indictment re deft. Newman.

May 10 — Minute entry: Hearing held on motion to dismiss re deft. Newman and motion for severance. R. Lebowitz pres. for Govt. T. Galbraith pres. for deft. Newman. Order both motions are denied.

May 11 97. File application for appointment of more than one counsel for deft Goldberg pur. to Criminal Justice Act.

May 11 98. LODGE order appointing counsel for deft. Goldberg under the Crim. Justice Act.

May 14 99. File deft. Goldberg's additional pretrial motions.

May 14 100. File reporter's transcript of proceedings held on May 7, 1973.

May 14 101. File Govt's trial brief.

May 14 102. File Deft. Goldberg's proposed voir dire questions to be asked the jury.

May 14 103. File letter dated May 11, 1973 to Judge Copple from George Nazarian.

May 14 104. Enter and file order appointing counsel for defendant Goldberg (Geo. Nazarian)

May 14 105. File Answer to Deft Goldberg's additional pretrial motions.

May 14 106. File appointment of Donald Smaltz as counsel for deft. Goldberg, Pur. to CJA

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May 15 — Minute entry: Motion for order compelling Govt to disclose all material in its possession, etc., Motion to compel Government to disclose any information re any evidence or leads, etc. including wiretapping, Renewal of motion to dismiss the Indictment, etc. (see Doc. #99). J. Jenckes and R. Lebowitz pres. for Govt. Defendant Goldberg pres. and with counsel Donald Smaltz. No other appearances. Jerry West, Special Agent, sworn and exam. re wire-tapping. In summary, the following orders were made: that counts 13, 15 and as to deft. Goldberg, are dismissed; motion to sever for trial re Goldberg and Newman is granted; motion to dismiss the Indictment denied; Govt. to produce copy of every document in its possession to be used in this case, all Jenckes Act Statements, etc by 5/16/73 and any documents that Govt. may acquire later on under Brady Rule during the course of the trial to deft. Goldberg; to give rap sheets, if any, on all witnesses that Govt. intends to call for trial to deft. Goldberg, plea bargaining re deft. Clark to be read to atty Smaltz from court reporter's tapes; Govt to furnish the Court a complete list of logs re wiretapping, all tapes, order from the Justice Department authorizing wiretapping, etc. re years 1968 thru 1973 and Court will check this in camera, as to deft. Goldberg. Govt. to furnish counsel for deft. Goldberg tapes of all Goldberg Conversations and to play said tapes for counsel to hear, etc. It is further ordered that trial date of May 15, 1973 is vacated and reset for trial with a jury at 9:30 a.m. on May 22, 1973 in ctrm #3. It is further ordered that all witnesses return on 5/22/73 at 9:30 a.m.

May 16 107. File agreement of Edwin S. Newman, (sealed)

May 16 108. File reporter's transcript of hearing held May 15, 1973 re motions (see doc. #99).

May 16 109. Enter and file Order re Justice Department's file, etc. and further ordered that this order, along with the file, is sealed by the Court and not to be opened by anyone, including the clerk's staff, except as necessary in trial pro-

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ceedings. (cc of order personally delivered to R. Lebowitz and D. Smaltz by F. Daudet).

May 17 110. File reporter's transcript of proceedings on change of plea of deft. Clark.

May 18 111. File motion of Deft. Goldberg for discovery and inspection, set for hearing at 10:00 a.m. on 5/21/73 in ctrm #3.

May 18 112. File motions by deft. Goldberg for modification of Court's order of May 15, 1973, Motion for supplemental order for additional documents re electronic surveillance and Motion for Further Order for disclosure of electronic surveillance re certain Government witnesses; set for hearing at 10:00 a.m. on 5/21/73 in ctrm #3.

May 21 — Minute entry: Motion for discovery and inspection, Motion for modification of Court's order of 5/15/73, Motion for supplemental order for additional documents re electronic surveillance and motion for further order for disclosure of electronic surveillance re certain government witnesses on for hearing. R. Lebowitz pres. for Govt. Deft. Goldberg pres. and with counsel D. Smaltz and G. Nazarian. Order motion for discovery and inspection granted as to part I and denied as to part II. Motion for modification of Court's order of 5/15/73 is granted and Govt. to turn over to Smaltz 1966 and 1967 surveillance. Motion for supplemental order for additional documents re electronic surveillance Denied. Motion for further order for disclosure of electronic surveillance re certain government witnesses denied. Court enters motion and Order thereon to suppress re any evidence against deft. Goldberg re any wiretap information or any leads arrived therefrom. Order Rule 16 motion by Govt. to be complied with, in good faith, and to be complied within 3 days by deft (to submit list and copies of their, deft's, exhibits). Motion of deft. under Rule 16 re statements that Goldberg made to FBI or any other agency (deft. exhibits A, B, C and D marked for

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I.D. re this motion) denied, but Govt. ordered to make routine inquiries re any agencies that interviewed Goldberg or any witnesses in this case. Order Govt. to give deft Goldberg list of witnesses in order that they will be called each day and to give the Court a list of names of witnesses that will be called. Order matters in certification be sealed. (document #113).

May 21 113. File certification.

May 21 114. File Defendant's response to Govt's motion for discovery.

May 22 115. File supplement to proposed voir dire questions to be asked the panel of jurors by deft.

May 22 — Minute entry: On for jury trial as to deft. Goldberg. R. Lebowitz and J. Keilp pres. for Govt. Deft. Goldberg pres. and with counsel D. Smaltz and G. Nazarian. A jury of 12 persons, plus 2 alternates, are sworn and empaneled to try this case. Enter proceedings of trial. At 4:10 p.m. Order recess until 9:30 a.m. on 5/23/73. Jury admonished.

May 22 — Minute entry: Prior to trial and in chambers, motion of Deft. Goldberg to prohibit Govt. from using a jury book is denied in all respects. Motion of Govt. to use charts in opening statements is denied.

May 22 116. File Jury List.

May 23 — Minute entry: On for con't jury trial. Jury, all counsel and deft. being present, further proceedings are held. Order counsel to get together and stipulate to as much as possible all exhibits that can be marked directly into evidence. At 2:55 p.m. order recess until 9:30 a.m. on 5/31/73. Jury admonished.

May 23 117. File authorization and ORDER thereon for daily transcripts.

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May 24 118. File representation and stipulation thereon for introduction of Govt's exhibits.

May 24 — Minute entry: At 9:30 a.m. this morning jury excused until 1:30 p.m. so that counsel may continue examining exhibits and making stipulations thereto.

May 24 119. File second representation and stipulation thereon for introduction of Government's exhibits.

May 24 — Minute entry: Motion to suppress on for hearing (12:00 noon). R. Lebowitz pres. for Govt. Deft. Goldberg pres. & with counsel D. Smaltz & G. Nazarian. Deft. Goldberg sworn and exam. Deft's exhibits, re this motion to suppress, admitted into evidence. Order motion to suppress is denied in all respects.

May 24 — Minute entry: Sub., at 1:30 p.m., jury, all counsel and deft. being present, jury is now excused and ordered to return at 9:30 a.m. on 5/25/73 in order that counsel may continue their work on exhibits and stipulations.

May 25 120. File third stipulation for introduction of Govt's exhibits.

May 25 121. File Fourth stipulation for introduction of Govt's exhibits.

May 25 122. File reporter's transcript of opening statement on May 22, 1973.

May 25 — Minute entry: Jury, all counsel and deft. Goldberg being present, further proceedings of trial are now held. At 3:55 p.m. order recess until 9:30 a.m. on May 29, 1973.

May 29 — Minute entry: On for further proceedings of trial. Jury, all counsel and Deft. Goldberg being present. Trial now held. At 4:35 p.m. order recess until 9:30 a.m. on 5/30/73. Jury admonished.

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May 30 — Minute entry: On for further proceedings of trial. Jury, all counsel and deft. Goldberg being present. Trial now held. At 4:45 p.m. order recess until 9:30 a.m. on 5/31/73. Jury admonished.

May 31 — Minute entry: In absence of the jury, Deft's motion re Govt's witness list and seeing various files prior to trial are now heard. Deft's exhibit "A", re this motion marked for I.D. It is ordered that Govt to make good effort in supplying deft. with advance witness list and as soon as possible any files that are brought in by witnesses to be immediately given to deft. for access thereto. Jury, all counsel and deft. now being present, further proceedings of trial are now held. At 4:15 p.m. order recess until 9:30 a.m. on June 1, 1973. Jury admonished.

June 1 — Minute entry: On for further proceedings of trial. Jury, all counsel and deft. Goldberg being present. Trial now held. At 4:45 p.m. order recess until 9:30 a.m. on Tuesday, June 5, 1973. Jury admonished.

June 4 123. File acknowledgement of receipt of items pur. to Court order of 5/15/73 by deft. Goldberg.

June 4 124. File reporter's transcript of proceedings held May 21, 1973.

June 5 125. File affidavit of indigency re deft. Goldberg and ORDER thereon, & ordered

June 5 — Minute entry: In absence of the jury, deft's motion re witness list (Govt. should supply list in advance) and motion not to call witness Skillman on 6/6/73 now argued. Order Govt. to give deft., 24 hrs in advance, notice of any changes in witness list and further Govt may call witness Skillman as scheduled. Jury, deft. and all counsel being present, further proceedings of trial are now held. At 4:40 p.m. order recess until 9:30 a.m. on 6/6/73. Jury admonished.

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June 6 — Minute entry: On for further proceedings of trial. Jury, all counsel and deft. Goldberg being present. Trial now held. At 3:45 p.m. order recess until 9:30 a.m. on 6/7/73. Jury admonished. Order counsel to get together and go thru Skillman's files prior to Court on 6/7/73.

June 7 — Minute entry: On for further proceedings of trial. Jury, all counsel and deft. Goldberg being present. Trial now held. At 4:40 p.m. order recess until 9:30 a.m. on 6/8/73. Jury admonished.

June 8 — Minute entry: On for further proceedings of trial. Jury, all counsel and deft. Goldberg being present, trial now held, in absence of the jury, It is ordered that at conclusion of Govt's case deft. to furnish copies of any documents from files of atty Finn to Govt. Order clerk to turn over files of atty Finn to deft. Goldberg for inspection. At 4:40 p.m. order recess until 9:30 a.m. on 6/12/73. Jury admonished.

June 11 126. File reporter's transcript of Govt's opening statement.

June 11 127. File Govt's proposed list of witnesses, as communicated to defense for week of June 11, 1973.

June 12 — Minute entry: On for further proceedings of jury trial. Deft. Goldberg, all counsel and jury being present, further proceedings are held. At 4:30 p.m. order recess until 9:30 a.m. on 6/13/73. Jury admonished.

June 13 128. File authorization for reporter's transcripts and ORDER thereon.

June 13 — Minute entry: On for further proceedings of jury trial. Deft. Goldberg, all counsel and jury being present, further proceedings are held. At 4:20 p.m. order recess until 9:00 a.m. on 6/14/73. Jury admonished.

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June 14 — Minute entry: On for further proceedings of jury trial. Deft. Goldberg, all counsel and jury being present, further proceedings are held. Deft's motion for mistrial is denied. At 4:15 p.m. order recess until 9:00 a.m. on 6/15/73. Jury admonished.

June 15 — Minute entry: On for further proceedings of jury trial. Deft. Goldberg, all counsel and jury being present, further proceedings are held. At 4:20 p.m. order recess until 9:00 a.m. on 6/19/73. Jury admonished.

June 19 129. File acknowledgment of receipt of FBI Reports by the deft. Goldberg.

June 19 130. File Govt's proposed list of witnesses, as communicated to deft. Goldberg, for week of June 18, 1973.

June 19 — Minute entry: On for further proceedings of jury trial. In absence of the jury, deft's motion re handwriting of Newman is now argued. Deft's exhibit "A" re this motion marked for I.D. Also deft's motion to strike testimony of witness Skillman relating to handwriting of Newman argued. It is ordered that motions are denied. Jury return into open Court and at this time alternate juror #1, Mary Blehm, replaces juror #12, Marlow Riggins. Enter proceedings of trial. At 3:55 p.m. order recess until 9:00 a.m. on Thursday, June 21, 1973. Jury admonished.

June 21 — Minute entry: On for further proceedings of jury trial. Jury, deft. Goldberg and all counsel being present, further proceedings are held. At 3:45 p.m. order recess until 9:00 a.m. on 6/22/73. Jury admonished.

June 22 — Minute entry: On for further proceedings of jury trial. Jury, deft. Goldberg and all counsel being present, further proceedings are held at 4:15 p.m. order recess until 9:00 a.m. on 6/26/73. Jury admonished.

June 25 131. File authorization for daily transcript and ORDER thereon.

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June 25 132. File letter from Department of Justice re electronic surveillance.

June 25 133. File affidavit of indigency re Goldberg & ordered sealed.

June 26 — Minute entry: On for further proceedings of jury trial. All counsel, Jury and deft. Goldberg being present, further proceedings are held. At 4:25 p.m. order recess until 9:00 a.m. on 6/27/73. Jury admonished.

June 27 134. File affidavit of indigency re Goldberg & ordered sealed.

June 27 — Minute entry: On for further proceedings of jury trial. Jury, all counsel and deft. being present further proceedings of trial are held. Deft's motion for Govt. to produce notes re interview of Newman argued. Deft's exhibit "A" marked for I.D. only. Order motion denied. It is further ordered that deft. to give list of names of their witnesses to Govt. Govt's exhibit #35 marked for I.D. only and ordered sealed. At 4:35 p.m. order recess until 9:00 a.m. on 6/28/73. Jury admonished.

June 28 — Minute entry: On for further proceedings of jury trial. Jury, all counsel and deft. being present further proceedings of trial are held. At 4:35 p.m. order recess until 9:00 a.m. on 6/29/73. Jury admonished.

June 29 — Minute entry: On for further proceedings of jury trial. Jury, all counsel and deft. being present further proceedings of trial are held. Govt rests. Jury excused until 1:30 p.m. on Monday, July 2, 1973. Arguments on deft's motion for acquittal to be heard at 9:00 a.m. on 7/2/73.

June 29 135. File reporter's notes of ex parte hearing in chambers on 6/29/73 and ORDERED sealed.

July 2 136. File deft Goldberg's renewal of motion re production of Newman's statements to counsel for Govt., pur. to Jencks Act and Brady; and motion for all files records,

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documents and communications, whether oral or written, between attys for Newman and any representative of the Govt. re plea agreement entered into between Newman and the United States.

July 2 137. File deft. Goldberg's motion re insufficiency of Govt. response re wiretaps on deft. between Jan. 1, 1966 thru date of trial.

July 2 — Minute entry: Hearing on arguments on motion to dismiss. R. Lebowitz pres. for Govt. Deft. Goldberg pres. and with counsel R. Smaltz. It is ordered that motion for Govt atty's notes is denied; Motion re wiretaping and surveillance is denied and motion to dismiss cts 1, 2, 4, 7, 10, 11, 12, 14 and 16 is taken under advisement. Order trial proceedings set for 1:30 p.m. be vacated & to resume at 9:00 a.m. on 7/3/73.

July 3 138. File list of count mailings per exhibit numbers and transactions.

July 3 139. File memorandum in support of admission of testimony of Donald Smaltz.

July 3 — Minute entry: On for further proceedings of trial. Jury, Deft. Goldberg and all counsel being present, deft presents his case. In absence of the jury, deft's motion that Govt. produce any evidence which may be favorable to the deft. Govt states to the Court that they have none. Jury being present further proceedings are held. At 2:25 p.m. order recess until 9:00 a.m. on 7/5/73. Jury admonished.

July 3 — Minute entry: Atty Smaltz's motion re in support of his own testimony is now heard. Atty Smaltz sworn and exam. Deft's exhibit "A" adm. re this hearing only. Ronald Lebowitz sworn and exam. Order motion is taken under advisement.

July 5 140. File response to motion for Judgment of acquittal of certain counts.

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July 5 141. File memorandum in opposition to permitting defense attorneys to testify.

July 5 142. Docket and file affidavit of indigency as to deft. Goldberg & ordered sealed.

July 5 — Minute entry: On for further proceedings of jury trial. In absence of the jury, atty's notes re Tager interview are ordered sealed and further ordered that no attys will testify in this case. Witness, atty Albert Swartz, states to the Court that he will not tesify on behalf of the deft. is Govt. is going to Indict him. Govt states to the Court that atty Swartz will not be indicted. Order Govt. to make inquiry if any surveillance has been conducted against atty Swartz and to present such evidence, if any, to the Court for in camera inspection. Jury being present, further proceedings are held. At 4:30 p.m. order recess until 9:00 a.m. on 7/6/73. Jury admonished.

July 6 — Minute entry: On for further proceedings of jury trial. Counsel, Deft. and jury being present, further proceedings are held. At 4:35 p.m. order recess until 1:30 p.m. on Monday, July 9, 1973. Jury admonished.

July 9 143. File defendant Goldberg's first set of proposed jury instructions.

July 9 — Minute entry: At 1:30 p.m. counsel and deft. Goldberg being present and in absence of the jury, it is ordered that deft's motion for judg. of acquittal of various counts of the Indictment is denied in all respects and order motion denied re IRS files of Goldberg re income tax for yrs 1966, 67 and 68 and ordered sealed for possible appeal purposes. Jury being present, further proceedings are held. At 4:45 p.m. order recess until 9:00 a.m. on 7/10/73. Jury admonished.

July 10 144. File stipulation re admissions of exhibits from Mr. Horridge's files.

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July 10 — Minute entry: On for further proceedings of trial. Deft., jury and all counsel being present further proceedings are held. At 4:35 a.m. order recess until 9:00 a.m. on 7/11/73. Jury admonished.

July 11 — Minute entry: On for further proceedings of trial, Jury, counsel and deft. being present, further proceedings are held. Deft's motion for mistrial and that the jury be discharged is denied. DEFT. RESTS. Govt's rebuttal is now heard. Edwin S. Newman, prev. sworn, resumes the witness stand. GOVT. Rests. At 4:30 p.m. jury excused and ordered to report back at 8:00 a.m. on Friday, July 13, 1973. Order counsel and deft. Goldberg to report back to Court at 10:00 a.m. on 7/12/73 for arguments on motions, etc.

July 12 145. File defendant Goldberg's second set of proposed jury instructions.

July 12 146. File Govt's requested jury instructions (as amended).

July 12 — Minute entry: Arguments on motions are now heard. Deft. Goldberg pres. and with counsel D. Smaltz. R. Lebowitz pres. for Govt. Upon agreement of counsel, it is ordered that exhibits, marked into evidence, be withdrawn as follows: 3G-01, 3G-02, 3G-03; 3K-07, 07, 09, 10 and 11; 3V-61 thru 67 and further that a certain page from exhibit 3-e (special meeting of board of directors of FSLIC, dated June 11, 1969) be withdrawn. Deft. renews motion for Judgment of Acquittal as to all counts and said motion is denied.

July 13 — Minute entry: Both sides having rested, arguments are now presented to the jury. Court instructs the jury and jury retire at 3:20 p.m., in charge of sworn bailiff, to consider of their verdicts. At 7:00 p.m. jury excused and admonished and ordered to return on Sat., July 14, 1973 at 9:00 a.m. to con't their deliberation. It is ordered

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that those exhibits not entered in evidence or marked for I.D. and not referred to be returned to the respective parties.

July 14 — Minute entry: At 9:00 a.m. jury being present and continue their deliberations. At 4:10 p.m. jury return into open Court and thru their foreman present the following verdicts: Guilty as to all cts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 & 16. Order jury discharged from further consideration of this case. It is further ordered that sentencing be tentively set for 9/10/73 at 12:30 p.m. and deft. Goldberg may remain on present bond. It is ordered that if deft. has a passport, he is to surrender it no later than Friday, 7/20/73 and if deft. has no passport, he is notify the Clerk of that fact. Deft. is further restricted to the same travel conditions as original imposed on his bond. Deft's motion for Judg. of acquittal and for new trial is denied.

July 14 147. File verdict: Guilty all cts charged in re deft. Goldberg.

July 16 148. File instructions to the Jury.

July 16 149. File reporter's transcripts of trial proceedings (29 volumes altogether).

July 16 150. File affidavit of indigency and ordered sealed.

July 25 151. File CJA Form 21 Authorizing Payment of Expenses for Services of Commercial Lender, Henry T. Willmuth. Ordered sealed.

July 25 152. File CJA Form 21 Authorizing Payment of Expenses for Services of SEC attorney, J. Joseph Kennedy. Ordered sealed.

July 30 — Minute entry: The Court today ordered that sentencing as to deft. Goldberg be con't from 9/10/73 to 9/17/73 at 12:30 p.m. (also deft. Clark will be sentenced that date).

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July 30 153. Docket and file affidavit of P. Goldberg (orig. filed on 7/23/73).

Sept. 4 — Minute entry: The Court today ordered that sentencing as to deft. Clark be con't from 9/17/73 until a later date.

Sept. 4 — Mailed cc re above minute entry to R. Lebowitz and D. McCord.

Sept. 14 154. File affidavit of Daniel Friedman with attached exhibits.

Sept. 17 — Minute entry: On for sentencing as to deft. Goldberg. R. Lebowitz pres. for Govt. Deft. Goldberg pres. and with counsel D. Smaltz. Order sentencing be con't until 10/5/73 at 12:15 p.m. It is further ordered that deft. may travel anywhere in the Continental United States, but not outside the U.S., so long as said travel is related to his employment, employment opportunities, or employment related activities.

Oct. 5 — Minute entry: On for sentencing as to deft. Philip J. Goldberg. R. Lebowitz pres. for Govt. Deft. Goldberg pres. and with counsel Donald Smaltz. Prior to sentencing a hearing is held in chambers in which certain exhibits are admitted and ordered sealed.

Oct. 5 155. Enter and file Judgment and Commitment as to deft. Goldberg: 2 yrs impr., to run concurrently as to cts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 16. It is further ordered that deft. pay a fine in the amt. of $1,000 on each of said counts making a total of $14,000,00. Deft. may remain on present release status pending appeal.

Oct. 5 — cc re above order re deft. Goldberg delivered to marshal, probation and Donald Smaltz and deft. Goldberg.

Oct. 5 156. File Deft's Goldberg Notice of Appeal. Copy sent to: US Atty, Probation, US Marshall, 9th CCA, Crt Reporter.

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Oct. 5 157. File Deft's Goldberg Designation of Record on Appeal. Copy to US Atty, 9th CCA Crt Reporter.

Oct. 30 158. File praecipe re to issue summons for deft. Clark to appear for sentencing on 11/12/73 in ctrm #3. (summons issued to marshal plus one to atty Mr. McCord).

Nov. 1 — Minute entry: On for further proceedings as to deft. Newman. R. Lebowitz pres. for Govt. Deft. Newman pres. and with counsel T. Galbraith. Order this matter be con't until 11/26/73 at 12:30 p.m. for further proceedings.

Nov. 6 — MINUTE ENTRY: Good cause appearing, it is ORDERED that time in which to docket the appeal in the 9th CCA is extended until January 3, 1974.

Nov. 12 — Minute entry: The Court today ordered that sentencing be con't, as to deft. Robert Stanley Clark, to 11/19/73 at 12:30 p.m.

Nov. 13 — Minute entry: By request of the probation office, the Court today ordered that sentencing as to deft. Newman be con't from 11/26/73 to 12/10/73 at 12:30 p.m. (counsel notified by phone).

Nov. 13 159. File summons returned executed as to deft. Robert Stanley Clark.

Nov. 19 — Minute entry: On for sentencing as to deft. Clark, T. Crowe pres. for Govt. Deft. Clark pres. & with counsel David McCord.

Nov. 19 160. Enter and file Judgment and Commitment as to deft. Clark: cmt. 3 yrs impr. provided that deft. spend 6 months in jail, execution of remainder of sentence of impr. is suspended & deft, placed on prob. for such period. It is further ordered that deft. pay a fine in the amt. of $1,000.00. Execution of sentence is suspended until 12:00 noon on Friday, Nov. 23, 1973, at which time deft. will surrender himself to the marshal and at that time bond will be exonerated. It is ordered that counts 1 and 4 thru 17 are dismissed.

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Nov. 19 Issue cc re above order to marshal and prob. office.

Nov. 21 161. File motion to extend time for commitment as to deft. Robert S. Clark.

Nov. 21 162. Enter and file order that time for commitment as to deft. Robert S. Clark may be extended from 11/23/73 at 12:00 noon until 12/7/73 at 12:00 noon, and the bond in this cause shall continue in force and effect until further orders of the Court.

Nov. 21 — Issue cc re above order to marshal.

Nov 21 — Minute entry: The Court today ordered that deft. Robert Stanley Clark shall surrender himself to the marshal, in Dallas, Texas, at 12:00 noon on 12/7/73.

Nov. 21 — Issue cc re above minute entry to marshal.

Nov. 23 163. File motion by deft, Goldberg for reduction of sentence.

Nov. 23 164. Enter and file order that deft Goldberg's motion for reduction of sentence is denied.

Nov. 23 — Mailed cc re above order to U.S. Atty and D, Smaltz.

Nov. 26 — Minute entry: Order further proceedings in this case as to deft. Newman be con't until 12/10/73 at 12:30 p.m.

Dec. 5 165. File application for reimbursement for advanced funds on behalf of Deft. Goldberg, and affidavit of Mrs. Goldberg.

Dec. 5 166. Enter and file order extending time for commitment as to deft. Clark from 12/7/73 to 1/4/74, at which time deft. Clark will surrender himself to the Marshal at Dallas, Texas. The bond shall remain in full force and effect until further orders of this Court.

Dec. 5 — Issue cc re above order to U.S. Marshal and atty McCord.

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Dec. 5 167. Enter and file order that the application for reimbursement for advanced funds on behalf of indigent deft. Goldberg is denied.

Dec. 5 — Mailed cc re above order to U.S. Atty and Donald Smaltz.

Dec. 10 168. File motion and stip. for con't of sentencing as to deft. Newman from 12/10/73 to 12/17/73 at 12:30 p.m. and ORDER thereon.

Dec. 10 — Mailed cc re above motion and stip, to U.S. Atty and T. Galbraith.

Dec. 17 — Minute entry: On for further proceedings as to deft. Newman, R. Lebowitz pres. for Govt. Deft. Newman pres. & with counsel T. Galbraith. Order of Govt., it is ordered that this case be dismissed, as to deft. Newman and his bond exonerated.

Dec. 17 — Issue notice of dismissal, re deft. Newman, to marshal.

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Jan. 2 169. File reporter's transcript of procedings, volumes A through O (Original and three copies)

[C.T. 1-18]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CR 70-517 PHX

VIO: 18 U.S.C. § 1341
(Use of Mails in Scheme to Defraud)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK, DEFENDANTS

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

1. That at all times hereinafter mentioned, Financial Security Life Insurance Company (hereinafter referred to as Financial Security) was a life insurance company organized under the laws of the State of Arizona and doing business in Phoenix and Scottsdale, Arizona.

2. That at any time hereinafter mentioned, PHILIP J. GOLDBERG was Chairman of the Board of Directors and President of Financial Security; EDWIN S. NEWMAN was Vice President and a Director of Financial Security; EMIL TUCKER referred purchasers of single premium annuity policies to Financial Security; WIL-

LIAM MILES SKILLMAN purchased and used Financial Security annuity policies and ROBERT STANLEY CLARK purchased and used Financial Security annuity policies.

3. That from on or about the 20th day of January, 1968, and continuing to on or about the 9th day of January, 1970, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK hereinafter referred to as "defendants" devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from persons, banks and other lending sources, including:

BANK OF DENVER, 1534 California Street, Denver, Colorado

BANK OF THE SOUTH, P. O. Box 1088, Gretna, Louisiana

EMPIRE BANK, 1800 South Glenstone, Springfield, Missouri

FIRST NATIONAL BANK, 201 Franklin Street, Clarksville, Tennessee

FIRST NATIONAL BANK OF MASON CITY, 5 North Federal, Mason City, Iowa

HALLWOOD CORPORATION, Rural Route 1, Springfield, Missouri

HAUBSTADT STATE BANK, 101 Main Street, Haubstadt, Indiana

RAY HYLAN, 3440 West Henrietta Road, Rochester, New York

KAW INVESTMENT COMPANY, 711 Truman Road, Kansas City, Missouri

LIBERTY NATIONAL BANK, 130 Montgomery Street, San Francisco, California

MEDICANA LEASING CORPORATION, 227 South 7th Street, Springfield, Illinois

MID-CONTINENT NATIONAL BANK, 4901 Main Street, Kansas City, Missouri

NATIONAL BANK OF NORTH AMERICA, 116 5th Avenue, New York City, New York

ROYAL NATIONAL BANK OF NEW YORK, 1212 Avenue of the Americas, New York City, New York

SECURITY STATE BANK, 12 East Wall Street, Fort Scott, Kansas

SOUTHWEST NATIONAL BANK, 320 North Stanton, El Paso, Texas

T & C ENTERPRISES, 227 South 7th Street, Springfield, Illinois

that could be induced to loan money and take as collateral to secure the repayment of such loans single premium annuity policies issued by Financial Security, well knowing at the time that the said pretenses, representations and promises, which are specifically described hereinafter, would be and were false and fraudulent when made, which scheme and artifice to defraud is set forth more fully below.

4. It was part of said scheme and artifice to defraud that Financial Security would operate an insurance business from Phoenix and Scottsdale, Arizona.

5. It was a further part of said scheme and artifice to defraud that the defendants would cause Financial Security (1) to issue single premium annuity policies to defendants PHILIP J. GOLDBERG, WILLIAM MILES SKILLMAN, ROBERT STANLEY CLARK and others, (2) to take from the purchasers of such policies interest bearing promissory notes in payment of premiums on the said annuity policies, and (3) to require the purchasers to pay in advance to Financial Security the interest due for one year on said promissory notes.

6. It was a further part of said scheme and artifice to defraud that the purchasers of single premium annuity policies issued by Financial Security were required to and did execute Reservation of Benefits and Proceeds riders, providing, in substance, that all proceeds and benefits

payable under the terms of said annuity policies would be reduced by the total amounts remaining due and unpaid on promissory notes given to Financial Security in payment of premiums on said annuity policies.

7. It was a further part of said scheme and artifice to defraud, and as intended by the defendants, that single premium annuity policies issued by Financial Security, on which annuity policies premiums had been paid with promissory notes and which were subject to Reservation of Benefits and Proceeds riders, would have no endorsements or notations on said policies, or attachments affixed to said policies, indicating that promissory notes had been accepted in payment of premium on said policies and that said policies were subject to Reservation of Benefits and Proceeds riders.

8. It was further part of said scheme and artifice to defraud that the defendants and others who obtained single premiums annuity policies issued by Financial Security, on which policies the premiums had been paid with promissory notes, and which policies were subject to Reservation of Benefits and Proceeds riders, would and did use and cause said annuity policies to be used to borrow money from persons, banks and other lending sources, by assigning said annuity policies to said persons, banks and other lending sources from which loans were obtained or sought, as collateral to secure the repayment of said loans; and that said assignments would be received, endorsed and recorded at the home office of Financial Security.

9. It was further part of said scheme and artifice to defraud that the defendants would and did make and cause to be made to persons, banks and other lending sources that made and considered making loans to be collateralized with single premium annuity policies issued by Financial Security the premiums for which annuity policies had been paid with promissory notes on which there were unpaid balances, and which annuity policies were subject to Reservation of Benefits and Proceeds riders, certain false and fraudulent pretenses, representations and promises, among which were the following:

(a) That premiums were paid in full on single premium annuity policies issued by Financial Security which were offered as collateral for loans;

(b) That there were no liens or encumbrances of record against single premium annuity policies issued by Financial Security which were offered as collateral for loans;

(c) That the face value shown on single premium annuity policies issued by Financial Security which were offered as collateral for loans, was the cash surrender value and would be paid by Financial Security to the designated annuitant or his assignee upon presentation after the due dates specified in said annuity policies;

whereas, in truth and in fact, as the defendants well knew at the time, the aforesaid pretenses, representations and promises were false and fraudulent when made, in that:

(a) No payments, except interest payements, had been made on the promissory notes accepted by Financial Security in payment of premiums on said annuity policies;

(b and c) Reservation of Benefits and Proceeds riders reducing amounts payable under the terms of said annuity policies by amounts remaining unpaid on promissory notes accepted in payment of premiums to which said single premium annuity policies were subject, in effect, reduced the cash values payable to annuitants and assignees to nothing and made said annuity policies worthless as collateral for loans.

10. It was a further part of said scheme and artifice to defraud that the defendants would and did withhold and conceal from and fail to disclose to lenders to whom the single premiums annuity policies issued by Financial Security were offered as collateral for loans, certain material facts, the disclosure of which was necessary in order that statements and representations made and caused to be made by the defendants, and by persons who offered

said annuity policies as collateral for loans, would not be misleading, false and fraudulent, including the following material facts:

(a) That promissory notes had been accepted by Financial Security in payment of premiums on said single premium annuity policies issued by Financial Security and offered as collateral for loans, and that baiances remained unpaid on said promissory notes;

(b) That the single premium annuity policies issued by Financial Security and offered to lenders as collateral for loans were subject to riders providing, in substance, that proceeds and benefits payable under the terms of said annuity policies would be reduced when presented for payment by the total amounts unpaid on promissory notes accepted in payment of premiums on said annuity policies.

11. It was further part of said scheme and artifice to defraud that when said single premium annuity policies, issued by Financial Security and accepted by lenders as collateral for loans, were presented to Financial Security for payment, or when payment of cash values of said annuity policies was requested by said lenders, the lenders would then be informed that no amounts were payable to the said lenders on said annuity policies because no payments had been made on promissory notes accepted by Financial Security in payment of premiums for said annuity policies and said annuity policies were subject to Reservation of Benefits and Proceeds riders providing, in substance, that any amounts payable under the terms of said policies would be reduced by the total amounts remaining unpaid on premium notes.

12. On or about May 29, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so the defendants PHILLIP J. GOLDBERG and EDWIN S. NEWMAN caused to be placed in an authorized depository for mail matter within the State and District of Arizona, a letter dated May 29,

1968, addressed to Royal National Bank of New York, 1212 Avenue of the Americas, New York, New York 10036, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT II

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about August 2, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, and EMIL TUCKER knowingly caused to be delivered by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated July 31, 1968 addressed to Financial Security Life Insurance Company, 100 West Clarendon, Phoenix, Arizona, attention Mr. Philip Goldberg, President, in violation of Title 18 United States Code, Section 1341.

COUNT III

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about October 16, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK knowingly caused to be delivered by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated October 14, 1968, mailed by Mid-Continent National Bank, 4901 Main, Kansas City, Missouri 64112, addressed to Finan-

cial Security Life Insurance Company, Phoenix, Arizona, containing life insurance assignment questionnaires relating to single premium annuities Nos. 91032, 91033, 91034, 91035, and 91036 issued to Robert Stanley Clark, in violation of Title 18 United States Code, Section 1341.

COUNT IV

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about December 17, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within the State and District of Arizona, a letter dated December 17, 1968, addressed to First National Bank of Mason City, Mason City Iowa, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT V

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about December 26, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within the State and District of Arizona, a letter sent by Financial Security Life Insurance Company, addressed to Horridge Enterprises, Inc., 711-717 Truman Road, Kansas City, Missouri 64106, containing assignments of single premium annuities Nos. 91040 and 91042 issued to Robert Stanley Clark, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT VI

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about December 26, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within the State and District of Arizona, a letter dated December 26, 1968, addressed to Horridge Enterprises, Inc., 711-717 Truman Road, Kansas City, Missouri 64106, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT VII

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about December 31, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER,

WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within the State and District of Arizona, a letter dated December 31, 1968, addressed to Mr. Bill Skillman, Suite 909, Ozark National Life Bldg., 906 Grand Avenue, Kansas City, Missouri 64106, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT VIII

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about December 31, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within the State and District of Arizona, a letter dated December 31, 1968 addressed to Mr. Robert J. Stacy, Broadfield Road, Manlius, New York, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT IX

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about January 1, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WIL-

LIAM MILES SKILLMAN, and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within thhe State and District of Arizona, a letter dated December 31, 1968, addressed to Kaw Investment Corporation, P.O. Box 10130, Kansas City, Missouri 64111, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT X

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about January 2, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK knowingly caused to be delivered by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated December 31, 1968, mailed by Western General Corporation, 1125 First National Bank Building, Denver, Colorado 80202, addressed to Financial Security Life Insurance Company, 1100 Towne House Tower, Phoenix, Arizona, in violation of Title 18 United States Code, Section 1341.

COUNT XI

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about February 10, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J.

GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK knowingly caused to be delivered by mail at Phoneix, within the State and District of Arizona, according to the direction thereon, a letter dated February 7, 1969, mailed by National Bank of North America, 116 Fifth Avenue, New York, New York 10011, addressed to Financial Security Life Insurance Company, Phoenix, Arizona, in violation of Title 18 United States Code, Section 1341.

COUNT XII

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about February 24, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK caused to be placed in an authorized depository to mail matter, within the State and District of Arizona, a letter dated February 24, 1969, addressed to Mr. Bill M. Skillman, American Mortgage Corp., 906 Grand Avenue, Kansas City, Missouri, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT XIII

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about March 19, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises,

and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter within the State and District of Arizona, a letter dated March 19, 1969, addressed to Mr. Ernest Donnell, Jr., Box 234, Denham Springs, Louisiana, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT XIV

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about March 21, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter within the State and District of Arizona, a letter dated March 21, 1969, addressed to National Bank of North America, 116 Fifth Avenue, New York, New York 10011, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT XV

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about April 18, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false

and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK, knowingly caused to be deliveded by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated April 16, 1969, mailed by First National Bank of Clarksville, 201 Franklin Street, Clarksville, Tennessee, addressed to Financial Security Life Insurance Company, North Central Street, Phoenix, Arizona, in violation of Title 18 United States Code, Section 1341.

COUNT XVI

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about May 9, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK knowingly caused to be delivered by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated May 6, 1969, mailed by Royal National Bank of New York, 1212 Avenue of the Americas, New York, New York 10036, addressed to Financial Security Life Insurance Company, 1100 Towne House Tower, Phoenix, Arizona 85013, in violation of Title 18 United States Code, Section 1341.

COUNT XVII

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about May 16, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud

and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK knowingly caused to be delivered by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated May 14, 1969, mailed by First National Bank of Clarksville, 201 Franklin Street, Clarksville, Tennessee, addressed to Financial Security Life Insurance Company, Box 16168, Phoenix, Arizona 85013, in violation of Title 18 United States Code, Section 1341.

A TRUE BILL

/s/ [Illegible]
Foreman of the Grand Jury

RICHARD K. BURKE
United States Attorney

/s/ [Illegible]
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-70-517-PHX. WPC

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP J. GOLDBERG, DEFENDANT

AGREEMENT OF EDWIN S. NEWMAN

Pursuant to negotiations conducted by Ronald A. Lebowitz and Joseph Raymond Keilp, Assistant U. S. Attorneys, and Tom Galbraith, counsel for the defendant, I, Edwin S. Newman, do hereby agree:

1. To waive all Fifth Amendment rights that I may have in the above-styled cause, and give to the United States a complete statement under oath concerning those events which are the subject for prosecution in CR-70-517-Phx. WPC.

2. In the event that co-defendant, Philip J. Goldberg, elects to enter a plea of guilty to a felony as charged in the indictment in CR-70-517-Phx. WPC, Edwin S. Newman will enter a plea to two separate violations of Title 26, U.S.C., § 7203, and the government will recommend probation.

3. In the event that co-defendant, Philip J. Goldberg proceeds to trial, resulting in a finding of guilty by way of a jury verdict in CR-70-517-Phx. WPC, the following events will occur.

(a) The government will sever Edwin S. Newman and Edwin S. Newman will testify as a witness for the United States, said testimony being in conformity with the statement having been given to the United States Attorney under oath before trial.

(b) Edwin S. Newman shall, after conviction of co-defendant Philip J. Goldberg, and upon the exercise of discretion to be held for all purposes by the office of the United States Attorney, enter a plea to one count of

the indictment in CR-70-517-Phx. WPC, whereupon the United States shall recommend the disposition of probation as to Edwin S. Newman and shall dismiss all remaining counts in CR-70-517-Phx. WPC.

4. Furthermore, I, Edwin S. Newman, do expressly understand that in the event I fail to honor the terms of this agreement upon the conclusion of a trial of Philip J. Goldberg which results in a conviction, that the United States Attorney shall use my pretrial statement under oath as well as my testimony at the trial of Philip J. Goldberg against me in a subsequent trial in CR-70-517-Phx. WPC.

I do hereby certify that I have read, understood, and agree to follow the terms of this agreement.

/s/ Edwin S. Newman
EDWIN S. NEWMAN
Defendant

/s/ Tom Galbraith
TOM GALBRAITH
Attorney for Edwin S. Newman
WILLIAM C. SMITHERMAN
United States Attorney

/s/ Ronald A. Lebowitz
RONALD A. LEBOWITZ
Assistant U. S. Attorney

/s/ J. R. Keilp
JOSEPH R. KEILP
Assistant U. S. Attorney

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

EDWIN S. NEWMAN, Defendant, TOM GALBRAITH, Attorney for Edwin S. Newman, RONALD A. LEBOWITZ, Assistant U. S. Attorney, and JOSEPH RAYMOND KEILP, Assistant U. S. Attorney, each being first duly sworn upon his oath deposes and says:

The signatures on the foregoing Agreement of Edwin S. Newman are true and valid.

DATED this 11th day of May, 1973.

/s/ Edwin S. Newman
EDWIN S. NEWMAN
Defendant

/s/ Tom Galbraith
TOM GALBRAITH
Attorney for Edwin S. Newman
WILLIAM C. SMITHERMAN
United States Attorney

/s/ Ronald A. Lebowitz
RONALD A. LEBOWITZ
Assistant U. S. Attorney

/s/ J. R. Keilp
JOSEPH RAYMOND KEILP
Assistant U. S. Attorney

Subscribed and sworn to before me this 11th day of May, 1973.

/s/ Shirley J. Wilson
Notary Public

My Commission Expires
Jan. 11, 1974

SWORN STATEMENT OF EDWIN S. NEWMAN, taken on the 11th day of May, 1973, at the Federal Building 230 North 1st Avenue, Phoenix, Arizona, County of Maricopa, at the hour of 2:00 o'clock p.m., in the presence of:

Mr. Ronald A. Lebowitz,
Assistant United States Attorney;

Mr. Joseph Keilp,
Assistant United States Attorney;

FLYNN, KIMERER, THINNES AND GALBRAITH,
by Mr. Tom Galbraith,
for Mr. Edwin S. Newman;

Mr. D.C. Marshall,
Postal Inspector;

Conrad R. Blain,
Court Reporter.

EDWIN S. NEWMAN,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

MR. LEBOWITZ: Let the record show that this is an interview between the Office of the United States Attorney in the District of Arizona, and Mr. Edwin S. Newman, which is taking place on May 11th, 1973, at 2:00 o'clock p.m.

Present are Mr. Doyle Marshall, Postal Inspector, Mr. Edwin S. Newman, Mr. Tom Galbraith, attorney for Mr. Newman, and Mr. Ronald Lebowitz and Joseph Keilp, Assistant United States Attorneys.

EXAMINATION

BY MR. LEBOWITZ:

Q. Mr. Newman, before I ask you any questions, are you aware of the fact that anything that you say at this time may be used against you in a court of law?

A. Yes.

Q. You are aware that under the Fifth Amendment to the Constitution you have a right to say nothing?

A. Yes.

Q. You are represented by counsel, and have you conferred with your counsel prior to today?

A. Yes.

Q. And do you understand these rights, and do you at this time wish to speak to the Government under oath?

A. Yes, I do.

Q. All right.

MR. GALBRAITH: For the record, we are waiving the Fifth Amendment privilege. Mr. Newman has conferred with me at length about this. It's done voluntarily and knowingly and pursuant to an agreement entered into with the Government this day, a copy of which will be filed with the United States District Court, District of Arizona. I don't think it's necessary to read the terms of it since the agreement itself will be on file.

MR. LEBOWITZ: That's correct. All right.

* * * *

MR. LEBOWITZ: For the record, the time is now 4:30. We have not exhausted all the transactions of which Mr. Newman can testify.

(Whereupon, a discussion was held off the record.)

MR. LEBOWITZ: We intend to continue this discussion off the record at a later time this weekend, and that there are individuals—particularly the transactions of Williams, Peters and Franklin, as well as the Goldberg transactions with Royal National Bank of New York, which will be explored at a further time.

And Mr. Newman has indicated to the Government that he has knowledge of those transactions and could give significant testimony at the time of trial, at which time we will present that.

* * * *

[C.T. 361-364]

GROSSMAN SMALTZ GRAVEN & PERRY
Attorneys at Law
One Wilshire Building - Suite 2420
Los Angeles, California 90017
Telephone (213) 680-9770
Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. 70-517 PHX

UNITED STATES OF AMERICA, PLAINTIFF

v.

PHILIP J. GOLDBERG, ET AL., DEFENDANTS

DEFENDANT'S RENEWAL OF MOTION RE PRODUCTION OF NEWMAN'S STATEMENTS TO COUNSEL FOR THE GOVERNMENT, PURSUANT TO JENCKS ACT AND BRADY; and

MOTION FOR ALL FILES, RECORDS, DOCUMENTS AND COMMUNICATIONS, WHETHER ORAL OR WRITTEN, BETWEEN ATTORNEYS FOR NEWMAN AND ANY REPRESENTATIVE OF THE GOVERNMENT RE PLEA AGREEMENT ENTERED INTO BETWEEN NEWMAN AND THE UNITED STATES

I

Defendant Philip J. Goldberg renews his motion for production of the notes taken by Assistant United States Attorneys Lebowitz and Keilp during their various conferences with Edwin S. Newman prior to the time he testified on direct examination.[1] This motion is based upon 18 U.S.C. 3500 (The Jencks Act) and the doctrine announced in *Brady v. Maryland* and cases subsequent thereto which have been set forth in a memorandum previously filed with this Court.

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[1] Refers to conclusion of direct testimony.

18 U.S.C. 3500 provides in pertinent part:

"(a) In any criminal prosecution brought by the United States, no statement or report in the prossession of the United States which was made by a Government witness . . . to an agent of the Government shall be the subject of . . . discovery, or inspection until said witness has testified on direct examination . . .

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * *

"(e) The term "statement," as used in subsections (b), (c) and (d) . . . means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

There is nowhere in the verbiage of the Jencks Act a distinction between attorneys for the Government and investigative agents; *viz.*, F.B.I., postal, F.B.N., etc. It cannot be denied that an Assistant United States Attorney is an "agent of the Government." There being no distinction between the types of agents set forth in the Act, just because the agent who obtained the statement happened to be an attorney, the statement should not be any less compellable, upon an appropriate showing

that a written statement exists that was "adopted or approved by" the witness.

Since *Hickman v. Taylor*, 329 U.S. 495 (1947), a "work product" doctrine existed in the federal jurisdiction which can prohibit *in a civil case* an attorney from obtaining his adversary counsel's compilation of interviews, statements, memoranda, etc. However, even in civil cases, pursuant to Rule 26(b) (3) Civil Procedure, opposing counsel can obtain his adversary's work product. It is submitted that if Congress had intended the work product objection to apply in the type of situation at bar, it would have written it into the Jencks Act. There being no such recognition of that type of exception against discovery, it is in fact non-existent in federal criminal cases.

Even if the work product doctrine were stated to be applicable to attorneys' notes taken of witnesses' interviews, it is respectfully submitted that the same in the instant case should be compellable under the *Brady* doctrine. We have previously set forth at length in various memoranda filed with the Court an explanation of what we contend *Brady* requires, and respectfully refer the Court to the compilation of cases interpreting *Brady* which have been filed. Accordingly, it is respectfully submitted that the Court grant the motion of defendant previously made for the production of these notes.

In the event the Court does not order the production of the notes, it is respectfully requested that the Court at least order the notes to be produced for its *in camera* inspection, and then after inspection rule upon the defendant's request.

II

Pursuant to *Brady* v. *Maryland*, 273 U.S. 83 (1963), and the principles announced, recognized and articulated in *Giles* v. *Maryland*, 386 U.S. 66 (1967), and *Giglio* v. *U. S.*, 405 U.S. 150 (1972), defendant moves for production of all files, records, memoranda, correspondence, documents and evidence of conversations (whether oral or written) between attorneys for Edwin S. Newman and any representative of the United States relating,

directly or indirectly, to the plea agreement arrived at between Newman and the Government.

In Volume XXI of the transcript, pages 4244 through 4249, Newman was questioned extensively about offers of testimony made by him or his counsel wherein, in substance, the Government in essence rejected entering into plea negotiation, based upon the fact that Newman's testimony "wasn't strong enough" against Goldberg, and that thereafter, Newman changed his testimony to meet the demands of the Government. Newman essentially denied such occurrences.

To the extent that there is information in the Government's files and records which indicate to the contrary, or information—although not in the Government's files and records—by way of oral conversations not memorialized between Newman's counsel and/or Newman *and* any representative of the U. S. Government, including Mr. Jenckes, Mr. Lebowitz and any other government agent, that material ought to be produced forthwith. Certainly, it is in the nature of exculpatory or favorable evidence insofar as defendant Goldberg is concerned.

DATED: July 2, 1973.

Respectfully submitted,

DONALD C. SMALTZ
GEORGE NAZARIAN

By /s/ Donald C. Smaltz
DONALD C. SMALTZ
Attorneys for Defendant Goldberg

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Philip J. Goldberg 0366 0373

DEFENSE EXHIBITS: *Ident.* *Offered* *Rec'd*

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Jacqueline Roesling	B114					
W. G. Trexler, Jr.	B124					
Maryalice Darling	B170	B178	B202	B205		
H. A. Paradine	B207	B227	B296			
Herbert D. Bacher	C2	C50	C73	C76		
Salvatore V. Colonna	C80	C92				
David D. Dixon	C96	C161	C265			
Richard Shemano	C272	C328	C367			
Emil Tucker	C370	C423	C440			
Robert John Stacy	D15	D60	D114	D125		
Frank Sidoti	D159	D188	D208	D210		
Robert Stanley Clark	D218	D316	D393			
Kyle L. Dye	D409	D426				
Joseph W. DeBord	D432	D443	D454, D458	D457		
John O'Connor	E7	E16	E46			
Donald W. Maddux	E54	E74	E90			
Roy G. Horridge	E93	E142	E190	E196		
Samuel L. Sayles	E200	E219	E234			
P. Basil Lambros	E237	E250	E254			

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	Direct	*Cross*	*Redirect*	*Recross*	*Voir Dire*	*By the Court*
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Gary A. Hermann	E387	E404	E409			
Bill M. Skillman	E414	G2	G418, H230	H156	E413, F258, H64, G121	
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Larry H. Hoover	H249	H306, I193	I261			
Lester W. Hall	H353	H386	H396			
Alfred Friedman	H399	H435	H439			
Hadley Edwd. Kenslow	H440	I62	I115			
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Floyd O. Tucker	I179	I181	I183	I184		I182
James R. Potter	I279	I322	I353	I362	I288, I296	
John Schwandner	I365	I371	I377			
William C. Brickey	I378	J2	J62	J78		
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Edwin S. Newman	N337	N419	N465			

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3B	L480				
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3C	B126	B165	B165		
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3X	B165	B165	B165		
3Y	B157, B165	B157, B165	B159, B165		
3Z	B165	B165	B165		
3AA	B157, B165	B157, B165	B159, B165		
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3JJ	B157, B166	B157, B166	B159, B166		
3KK	A306	A306	A306		
3LL, 3MM	G228	G228	G228		
3NN	A307	A308	A308		
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5BB thru 5MM	B168	B168	B168		
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6B	D253	D258	D258		
6C thru 6F	D254	D258	D258		
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6H	D263, D314, D400	D401	D402		
6J	D265	D301	D303		
6J-1	D303, D420	D421	D421		
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7A	D295	D306	D306		
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7F	D288	D290	D290		
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7H	D305	D307	D307		
7I	D305	D307	D307		
7J	D307	D315			D315
7K	D303	D304	D304		
7M	D281	D283	D284		
7N	D281	D283	D284		
7-O	E137	E138	E138		
7P	E135	E136	E137		
8A	E393	E394	E394		
8B	E396	E396	E396		
8E	E402	E403	E403		
8F	E398	E399	E399		
8G	E399	E400	E400		
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10C-2	F376	F376	F376		
10C-3	F305	F305	F305		
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10E-11	E284	E284	E284		
10E-12 thru 10E-15	E285	E285	E285		
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10G-2 thru 10G-4	F284	F285	F286		
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10I-7	G303	G303	G303		
10I-8	G303	G304	G304		
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10I-10	G362	G362	G362		
10I-11	G305	G305	G305		
10I-12	G362	G362	G362		
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10I-14	G362	G362	G362		
10I-15	G307	G307	G307		
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10P-5	H91	H92	H92		
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11D	D43	D44	D44		
11E	D47	D47	D48		
11G	D60	D60	D60		
12A	D22	D24	D24		
12D	D50	D51	D51		
12E	D194	D194	D194		
12F	D165	D167	D167		
12G	D171	D171	D171		
12H	D177	D176	D177		
12I	D179	D179	D179		
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12N	K91	K92			K94
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12S	D183	D184	D184		
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13C	H301	H301	H301		
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	Ident.	Offered	Rec'd	Ref'd	W'drawn
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14G	H367	H367	H367		
14H	H372	H372	H372		
14I	H318	H318	H318		
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16F	H412	H412	H412		
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16L	H424				H424
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Gov't Ex's (cont'd):					
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19B	E211	E211	E212		
19C	E216	E217	E217		
19D	E206	E207	E207		
19E	E204	E205	E205		
19F	E204	E204	E204		
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20B	E62	E64	E64		
20C	E57	E58	E59		
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23C	I133	I135	I135		
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23M	I54	I55	I55		
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23S	I51	I52	I52		
23S-1	I52				
23T	I144	I145	I145		
23U	I142	I143	I143		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Gov't Ex's (cont'd):					
24A	C282	C282	C282		
24B	C284	C285	C285		
24C	C285	C287	C287		
24D	B157, B166	B157, B166	B159, B166		
24E	C327				C327
24F	B157, B166	B157, B166	B159, B166		
24G	C327				C327
24H	C327	C327	C327		
24I	C296	C297	C298		
24J	C302				
24J-1	B157, B166	B157, B166	B159, B166		
24K	C327				C327
24L	C302	C303	C303		
24N	C324	C326	C327		
24-O	C229, C284	C284	C284		
25A	C108	C110	C110		
25B	C106	C107	C108		
25C	C120	C120	C120		
25D	C106	C114	C114		
25E	C269, J198	J198	J198		
25F	C106	C134	C134		
25G thru 25P	C156	C157	C157		
25Q	C159	C159	C159		
25R	C159	C159	C159		
25S	C136	C137	C137		
25T	C166	C166	C166		
25U	C149	C149	C149		
25V	C118	C118	C119		
25W	C138	C140	C140		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Gov't Ex's (cont'd):					
25X	C139	C140	C140		
25Y	C269				
25Z	C140	C141	C142		
25AA	C157	C158	C158		
25BB thru 25DD	C269				
25EE	C145	C145		C146	
25FF	C146				C148
25GG thru 25KK	C269				
26A	I287	I288	I290		
26B	I286	I294	I294		
26C	I282	I284	I284		
26D thru 26F	I283	I284	I284		
26G, 26H	I302	I304	I304		
26I	I305	I307	I315		
26J	I317				
26K	I310	I311	I311		
27G	K96	K97	K97		
28B	J418				
30A	H241	H241	H241		
30B	H241	H241	H241		
30C	H243	H244	H244		
31A	I384				
31B, 31C	I408	I408	I409		
31E	B6, I383	I384	I384		
31F thru 31M	I383	I384	I384		
31N	I400	I401	I401		
31-O	I415	I415	I415		
31P	I398	I399	I399		
32A	J236	J236	J236		
32B	K114, M65	K115	K116		
33	A319	B2	B3		
33A thru 33C	A319	B2	B3		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Gov't Ex's (cont'd):					
34A	F269	F270	F270		
34B	F275	F270	F270		
34C	F318	F319	F319		
34D	F356	F356	F357		
34E	F352	F353	F353		
34F	G427	G427	G428		
34G	H9	H10	H11		
34H	H123	H124	H124		
36A thru 36D	M275, M279	M279	M279		
37A	M267	M269			
37B	M269				
37C	M271				
37D	M272				
37F	M274				
Defense Ex's:					
A1	B71	B72	B72		
A2	B72	B73	B74		
A3	B74	B81	B81		
A4	B81	B81	B81		
A5	B81	B81	B81		
A6	B81	B81	B81		
A7	B81				
B1	B195				
C1	C67	C67	C67		
D1	C218	C218	C219		
D3	C237	C238	C238		
D4	C244	C245	C245		
E1	C359	C359		C363	
E3	C341	C344	C348		
E4	C343	C344	C348		
E5	C344	C344	C348		
E6	C349	C350	C350		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Defense Ex's (Cont'd):					
E9	C365	C365	C365		
E11	C364	C364	C364		
E12	C352	C353		C354	
E13	C355	C355	C355		
E14	C338, C356	C358	C358		
E15	C339	C363	C363		
F1	C433				
G1	D193				D213
G2 thru G4	D193				
H1	E181	E181	E189		
H2	E185	E185	E186		
H3 thru H13	N332	N332	N332		
I2	E80	E80	E80		
I3	E84				
I5	E85	E85	E86		
I7	E87	E87	E87		
J1	E230, G377			E231	
J2	E233				
K2	G220	G222			
K3	H180	H180	H180		
K8	G324	G326	G326		
K11	G240	G241	G241		
K15	J395	J396	J397		
*L1	E370, F269				
*L2	F399	G211	G211		
*L3	G150				
M1	G116, H193	H193	H197	H194	

(*L1, L2 & L3 were, prior to page G167, erroneously referred to as K1, K2 & K3—Adjusted at page G167.)

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	Ident.	Offered	Rec'd	Ref'd	W'drawn
Defense Ex's (Cont'd):					
M2	G116, H193	H193	H197	H194	
M3	G120	G120	G123		
M4	G199	G199	G199		
M5	H200	H202	H202		
N1 thru N10	G284	G285	G285		
O-1 (Offer of proof page K278)	G310, J15, K271, L394	K273		K273	
O-2 (Offer of proof page K278)	G310, I249, J121, K271, L394	K273		K273	
O-3	H163	H166	H166		
O-4	H167				
O-5	H181	H182	H182		
O-6	H206				
O-7	H224	H225	H226		
P1	I155	I155	I157		
P2	I158	I157	I158		
P3	I336	I336	I336		
P4	J20	J23	J23		
P4-1	J21	J23	J23		
P5	J26	J25	J25		
Q1	K137, K271	K138, K273	K139	K273	
Q2	K159, K271	K273		K273	
Q3	K162	K162		K162	
Q5	K203	K204	K204		
Q6	K233	K234	K234		
Q7	K245, M60	K246, M61	M61		
Q8	K255	K255	K255		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Defense Ex's (Cont'd):					
Q9	K258	K262	K262		
Q10	K258	K262	K262		
Q11	K289	K290	K290		
Q12	K291	K291	K291		
Q13	K294	K294	K294		
Q14, Q15	K294	K294	K295		
Q16	K317	K318	K326		
Q17	K366				
Q18	K368				
Q19	K371	K371	K372		
Q20	K375	K376	K376		
Q21	K380	K380	K380		
Q22	K380	K380	K380		
Q23	K388	K389	K389		
Q24	K396	K397	K397		
Q25	K421	K422	K422		
Q27	L39	L39	L40		
Q28	N447	N447	N447		
Q29-2	N451	N454	N455		
S1	L319	L320	L320		
T1	L362	L363	L363		
U9	N71	N71	N71		
U10	N72	N72	N72		
U12-1 & U12-2	N372	N372	N373		
U13	N72	N75	N75		
U14 thru U17	N72	N75	N75		
U24	N192	N193	N193		
U25	N188	N191	N192		
U26	M76	M76	M76		
U27	M130	M131	M131		
U28	M131	M132	M134		
U29	M136	M137	M137		
U30	M295	M296	M296		
U31	N80	N82	N84		

Trial index—continued:

	Ident.	*Offered*	*Rec'd*	*Ref'd*	*W'drawn*
Defense Ex's (Cont'd):					
U32	N91	N93	N93		
U32A	N95	N96	N96		
U33	N98	N98	N99		
U34	N101	N103	N103		
U35	N102	N103	N103		
U36	N104	N105	N105		
U37	N108	N108	N109		
U38	N111	N111	N111		
U39	N113	N114	N114		
U41	N120	N119	N119		
U42	N120	N119	N119		
U43	N123	N123, N129	N133	N123	
U44	N137	N137	N138		
U45	N141	N141	N142		
U46	N144	N144	N144		
U47	N150	N151	N151		
U48	N152	N155	N155		
U48A	N152	N155	N155		
U49	N74	N75	N76		
U50	N74	N75	N76		
U51	N163	N164	N164		
U52	N167	N167	N167		
U53	N205	N207	N207		
U54	N179	N182	N182		
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U59, U60	N296	N297	N299		
U61	O-19	O-20		O-20	

(TRIAL INDEX CONCLUDED.)

(INDEX CONCLUDED.)

Excerpts of Reporter's Transcript

[K11-K14] Q. During that time, did you have occasion to review documents in this case?

A. Yes.

Q. Did you have occasion to contact counsel prior to this time?

A. Yes.

Q. And who was your counsel?

A. Mr. Tom Galbraith of the law firm of Flynn—

THE COURT: You will have to speak up, Mr. Newman.

A JUROR: Mr. Lebowitz, too.

THE COURT: You, too, Mr. Lebowitz.

MR. LEBOWITZ: I'm sorry.

Q. Again, let me repeat: Who was your counsel in this case?

A. My counsel is Tom Galbraith of the law firm of Flynn, Kimorer, Thinnes & Galbraith.

Q. Approximately how long have you been preparing, reviewing documents in this case for this trial?

MR. SMALTZ: Your Honor, in connection with what? In connection with testifying as a Government witness?

THE COURT: I think I know where he is getting at. Go ahead.

Q. BY MR. LEBOWITZ: Go ahead.

A. For better than two years.

Q. During this time, you have also had occasion to confer with the Government, have you not?

A. Yes, I have.

Q. Approximately how many times?

A. For a day or so in May and over the last ten days or so.

Q. Now, Mr. Newman, as a result of those contacts with the Government, did you have occasion to enter into an agreement with the Government concerning your testimony in this case as a Government witness?

A. Yes, I did.

Q. And was this agreement entered into with advice of counsel?

A. Yes, it was.

MR. SMALTZ: Your Honor, I object to the leading as well as to the relevancy of these questions.

THE COURT: Well, go ahead, Mr. Lebowitz. Quit leading the witness, but I think the questions are relevant.

Q. BY MR. LEBOWITZ: Mr. Newman, what, if any, agreement have you made with the Government regarding your testimony in this case as a witness?

MR. SMALTZ: I want to make an objection. If the agreement was reduced to writing, as I was informed it was, then the writing is the best evidence of the agreement and it's the place to start, and I would like to see it, because I haven't had an opportunity to see it yet.

THE COURT: The Government will produce it for you before you commence your cross-examination.

MR. LEBOWITZ: That is correct.

MR. SMALTZ: The problem is, it is still the best evidence. This witness is going to testify about it.

MR. LEBOWITZ: Your Honor, this is not going to be used as an item in evidence.

MR. SMALTZ: It is not?

THE COURT: Go ahead, Mr. Lebowitz.

Q. BY MR. LEBOWITZ: Mr. Newman, again I repeat, what, if any, agreement have you made with the Government regarding your testimony as a witness at this trial?

A. I agreed to waive my Fifth Amendment rights and to give the Government a sworn statement as to matters basic to the counts in the indictment.

The Government agreed to sever me from this trial, and I agreed to give testimony at this trial consistent with my sworn statement.

I further agreed that at the conclusion of this trial and at the discretion of the Government, I would enter a plea to one count in this indictment; that the U. S. Attorney's office would recommend probation and would dismiss the remaining counts in the indictment.

Q. Now, Mr. Newman—

MR. SMALTZ: Again, Your Honor—excuse me, I don't mean to be obstreperous, really, but I think I would move that agreement, if it was reduced to writing, be produced for me now, so I can examine it.

THE COURT: Do you have a copy of it now?

MR. LEBOWITZ: Your Honor, we will produce the agreement.

THE COURT: How about the recess?

MR. LEBOWITZ: At a recess, outside of the presence of the jury, for the defense to examine and to be used as cross-examination, if they choose.

THE COURT: You will give the defense a copy of the agreement during the recess.

MR. LEBOWITZ: That is correct.

THE COURT: Yes.

* * * *

[K182-K186] Q. Now, Mr. Newman, I think you testified that you made a—you entered into an agreement with the Government in connection with your testimony in this case, is that right?

A. Yes.

(Defendant's Exhibit Q3 marked for identification.)

Q. I show you a copy of this agreement (Handing exhibit to witness). Is that it?

A. Yes, sir, that is the agreement.

MR. SMALTZ: Your Honor, I move this be received in evidence. I would like to put it on the screen.

THE COURT: Come up.

AT THE BENCH, OUTSIDE THE HEARING OF THE JURY, ALL COUNSEL ATTENDING:

MR. LEBOWITZ: I object to this being admitted into evidence.

THE COURT: Why?

MR. LEBOWITZ: It was turned over—

THE COURT: It is offered for impeachment, solely.

MR. LEBOWITZ: That is correct, so what purpose does it serve?

MR. SMALTZ: It is not only for impeachment; it goes to the bias and prejudice of the witness against this defendant and the reason for him to give false testimony.

MR. KEILP: Why can't he question him about it?

MR. SMALTZ: The agreement is the best evidence.

THE COURT: Question him about it and you can

use it for impeachment, like you would a statement or something, but I am not going to admit it in evidence before the jury. You can go ahead and question him about it.

MR. SMALTZ: Could you tell me why, Your Honor?

THE COURT: Well, I think it is not evidence on the main case in this thing, one way or the other. It is for impeachment and it is only usable as impeachment, if he denies something or says something contrary to it. Otherwise, it doesn't impeach him. You can use it for cross-examination, and if he states something contrary to what is in there for impeachment purposes, you can bring it out, but it, by itself, I don't think that it is admissible in evidence in the case.

MR. SMALTZ: But it goes to the motive or reasons to lie and his bias and prejudice.

THE COURT: That has already been brought out, so question him about any part of it that goes to that.

MR. SMALTZ: Okay.

WITHIN THE HEARING OF THE JURY:

Q. BY MR. SMALTZ: This agreement was entered into between you and the Government on or about May 11th, 1973, is that correct?

A. Yes, sir.

Q. But prior to that time, you had had numerous discussions with Government counsel, had you not, about entering into this agreement?

A. I had not had such discussions.

Q. Through your counsel?

A. My counsel had had discussions.

Q. And you had met with Government agents, is that right?

A. Prior to this agreement?

Q. Yes, sir.

A. I met once prior to this agreement, with Government attorneys.

Q. When was that, sir? When was that?

A. Yes, I'm trying to recall, sir. I have a recollection of sometime in April.

Q. That the only time you recall meeting with Government attorneys?

A. That's correct.

Q. Didn't you meet with them again on May 11th?

A. Yes.

Q. So that's two times?

A. That's correct.

Q. All right. Now, when you first met with them in April, you made an offer to enter—to testify against Mr. Goldberg, did you not?

A. I made an offer with respect to myself in the trial.

Q. And at that time you were asked your version of certain events, is that correct?

A. No, not at that time I was not. If you are referring to the April Meeting, I sat through a meeting in which I didn't open my mouth.

Q. But your counsel spoke on your behalf?

A. My counsel discussed certain things with the U.S. attorneys.

Q. You were present, weren't you?

A. Yes.

Q. And he stated what you would be able to testify to in certain respects, did he not?

A. No, he did not, sir, that I recollect. Sir, there is a document which reflects mine and my attorney's point of view with reference to the offer that was made to the Government.

MR. SMALTZ: Your Honor, could I have the answer read? I missed part of it.

(Answer read.)

Q. BY MR. SMALTZ: Is that document something other than Q3?

A. Yes, sir.

Q. Does that document relate to past testimony that you had given or proposed testimony that you would give?

A. No, sir. It was an offer. It's a letter written by my attorney on my behalf.

Q. Did it set forth what you would be willing to testify to with regard to certain matters?

A. Sir, I don't mean to be facetious, but I say what

you have said several times on my direct examination. The document is its own best evidence.

THE COURT: Will you answer the question—would you answer the question as near as you can recall, if you can recall, what the contents were?

A. I do not recollect whether it contains that as part of the offer.

MR. SMALTZ: Your Honor, at this time I move the production of that. Certainly if it contains any evidence similar to that, it would be compellable under 18 U.S.C. 3500, and even if it doesn't, the witness here now states he is without any recollection and I'd like to see it because I think it has a reflection on his testimony on direct as well as cross.

THE COURT: Do you have a copy of it available?

MR. LEBOWITZ: Your Honor, I submit that that is a letter between counsel to our office. It's a—

THE COURT: That's why I wanted to look at it. Do you have it?

MR. LEBOWITZ: We don't have it up here. It's downstairs in our office somewheres.

THE COURT: We can take it up this afternoon or later.

Go ahead.

Q. BY MR. SMALTZ: Now, Mr. Newman, it's a fact, is it not, that after that April meeting the Government turned down your offer because you weren't willing to give them the testimony that they wanted; isn't that right?

A. No, sir, that was not the reason for their turning me down.

Q. It was not—

A. No.

Q What was the reason?

A. The reason, as best I can recollect, is that at that time they were uncertain as to what would be the advantages of my being tried separately from Mr. Goldberg.

Q. Didn't you speak with—did you ever speak directly with any one of the prosecutors here other than through your counsel.

A. At what point in time, sir?

Q. Any time prior to May 11, 1973, when you gave them this partial statement?

A. No, I did not.

Q Did you ever communicate through your counsel to the Government certain offers of what you would be willing to testify to—

MR. LEBOWITZ: I believe that's already—

Q. MR. SMALTZ: —as proposed testimony?

MR. LEBOWITZ: I believe this line of questioning has already been reviewed.

THE COURT: He may answer.

A. Would you repeat it, sir?

MR. SMALTZ: May we have it read back, please?

(Pending question read.)

THE COURT: This is prior to May 11th again?

Q. BY MR. SMALTZ: Yes, sir.

A. I only know, sir, what I communicated to my counsel. I do not know what he communicated to the Government. His communications with the Government were not in my presence.

Q. Would you answer the question?

THE COURT: He's already answered the question. He has already stated that he doesn't know what his counsel said to the U.S. Attorney because none of the conversations were in his presence.

Q. BY MR. SMALTZ: All right. Didn't your counsel call you and tell you in substance and effect that the Government wasn't prepared to go along with making any sort of deal with you because you hadn't come far enough in your testimony?

A. No, I don't recall such a call or such a statement by my counsel.

Q. Or anything approximately that?

A. No, sir.

Q. Now, in this agreement—

Your Honor, I'm going to pass that for the moment and come back to it after I see that letter, if I get a chance to see it.

THE COURT: Okay.

Q. BY MR. SMALTZ: Now, sir, as part of the agreement that you made with the Government, it was

provided that in the event that Philip J. Goldberg elects to enter a plea of guilty to a felony as charged in the indictment, Edwin S. Newman will enter a plea to two separate violations of Title 26 U.S.C. 7203 and the Government will recommend probation, is that right?

A. That's correct.

Q. 26 U.S.C. 7203 has nothing—is not involved in this indictment, is it?

A. That's correct.

Q. 26 U.S.C. 7203 is a federal statute relating to wilful failure to file returns, supply information or pay taxes under the Internal Revenue Code, is that right?

A. That's correct.

Q. Are you under investigation for failure to pay taxes?

A. Am I under investigation?

Q. Yes.

A. No, sir.

Q. Were you at any time?

A. No, sir.

Q. Is there any sort of information pending against you or indictment concerning your failure to pay taxes.

A. No, sir.

Q. Well, then, tell me why you would enter a plea of guilty to a misdemeanor that had to do with failure to pay taxes, file a return or supply information?

A. To the best of my recollection, there was a duty to file 1099 forms with reference to payments of over $600, which forms were not returned. This was in connection with Financial Security Life.

Q. And these forms were not filed, is that right?

A. That's correct.

Q. And that's the plea you were going to enter?

A. That's correct.

Q. Two misdemeanors?

A. That's correct.

Q. What's the difference between a misdemeanor and a felony, Mr. Newman?

MR. LEBOWITZ: Objection, Your Honor.

THE COURT: Objection is overruled.

A. As far as I can make out, a misdemeanor—anything that carries a sentence of a maximum of one year

and a fine of $1,000 is a misdemeanor, and anything over that is a felony.

Q. In connection with your indictment in this case, you were facing how many, 14 counts?

A. Yes.

Q. Or 15? Whatever it was.

A. Something like that.

Q. If you were found guilty on those counts, what would have been your maximum—the maximum amount of time you could have been in prison?

MR. LEBOWITZ: I am going to object to any further mention in this court of punishment.

THE COURT: It goes to the weight of the witness' testimony and it's a matter for the jury to judge.

He may answer.

A. Five years, and I'm not sure of the fine.

Q. $5,000 fine, is that right?

A. That's correct.

Q. So you were facing a maximum of 75 years, right?

MR. LEBOWITZ: 70, I believe.

A. 70, if it's 14.

Q. BY MR. SMALTZ: 70 or whatever it is, 14 times five.

A. Right.

Q. Now, this agreement further provided that in the event the co-defendant, Philip J. Goldberg, proceeds to trial resulting in a finding of guilty by way of jury verdict, the following will occur:

First, the Government will sever Newman and Newman will testify as a witness for the United States, said testimony being in conformity with a statement having been given to the United States Attorney under oath before trial, is that correct?

A. That's correct.

Q. How many statements did you give the Government?

A. I gave them the one sworn statement of May 11th.

Q. And that's this statement in this booklet, is that right?

A. That's correct.

Q. That statement was only some 89 pages, is that correct?

A. Yes, sir.

Q. Your trial testimony here has been considerably—covered much more ground than what you made in your statement, is that correct?

A. That's correct.

Q. This statement that we—Mr. Lebowitz speaking, "We intend to continue this discussion off the record at a later time this weekend."

Did you, after May 11, continue a discussion at a later time off the record after May 11?

A. Yes, I believe that there was some discussion on May the 12th.

Q. What day was that?

A. Was that a Saturday?

Q. All right. I take it you were here in Phoenix—

A. Yes.

Q. —on May 11 and May 12. When did you come to Phoenix?

A. I believe I came on May 11.

Q. So you met with the Government representatives on May 12, is that right?

A. You mean subsequent to May 11th?

Q. Yes, May 12th is subsequent—

A. Is May 12th a Saturday?

Q. May 12th is a Saturday.

A. Yes, I met with the Government on May 12th.

Q. And did you discuss what your testimony would be here?

A. Yes.

Q. Who did you discuss it with?

A. Mr. Lebowitz, Mr. Keilp.

Q. And did they take notes or jot down anything at all of what you were saying?

A. Yes.

Q. There wasn't a reporter present?

A. No.

Q. And as they took notes, did they sometimes question you about what you had just said to make sure that they got it down correctly?

A. They may have. I don't really remember that that was part of the pattern.

Q. All right. You talked with them on May 12th. Did you speak with them at any other time between then and now?

A. Well, I have—I have been here in Phoenix since Saturday—a week ago this past Saturday. Can you give me a date, sir?

Q. You can't recall?

A. Well, let me calculate it out. This past Saturday was the 23rd, so it would be the 16th of June.

Q. When did you leave Phoenix after your chat on the 12th of May?

A. I recollect that I left on a Sunday.

Q. That would have been Sunday, May 13th?

A. I believe so.

Q. You did not come back again until, was it, June 16th?

A. No. I believe there was one additional weekend between the weekend of May 12th and the weekend of June 16th.

Q. What weekend was that, sir?

A. Excuse me, sir. Can I—can I retrace?

My recollection is that first meeting in May, that I did not meet with them on Saturday, May 12th, because I flew to Dayton, Ohio, on May 12th for a speaking engagement at a convention in Ohio, and my recollection is that I flew back to Phoenix that Saturday night and met with the Government attorneys on Sunday, May 13.

Q. All right. You met with them on May 11 and May 13?

A. That's correct.

Q. When was the next time you met with them?

Is it difficult for you to recollect this, Mr. Newman?

A. No. I just want to keep it in proper sequence. I believe the weekend of June 9th and 10th I was also here at Phoenix.

Q. June 9th and 10th being a Saturday and Sunday?

A. That's correct.

Q. Who did you meet with in the Government's office?

A. Mr. Lebowitz and Mr. Keilp.
Q. Did you discuss your testimony?
A. With Mr. Lebowitz and Mr. Keilp?
Q. Yes.
A. Yes.
Q. Was a reporter there?
A. No.
Q. As you were explaining—or discussing your testimony, did anyone take notes?
A. The two gentlemen took notes.
Q. Were they occasionally read back to you to see whether or not they correctly understood what you were saying?
A. Probably from time to time.
Q. All right, sir. Did you either correct them or say, "Yes, that's right," or "No, that's not right because it went this way, I believe," words to that effect?
A. Yes, that would happen.
Q. Did you go back to—did you leave Phoenix on the 10th?
A. Yes. My recollection is that I—I'm not sure that I left on the 10th. I think I left on the 11th or the 12th.
Q. You met with them on the 9th, a Saturday. You met with them on the 10th, Sunday. Did you meet with them on the 11th?
A. If I'm correct that I was here on the 11th, yes, I met with them on the 11th.
Q. Did you meet with them on the 11th? Mondays have not been a court day thus far.
A. Yes, I did meet with them on the 11th.
Q. Same procedure, you talked with them, they write down what you are saying?
A. Yes.
Q. When did you leave Phoenix?
A. I believe I left on the 12th.
Q. Did you meet with them on the 12th?
A. I don't recollect meeting with them on the 12th.
Q. Where were you on the 12th?
A. I think I was flying back to New York on the 12th.
Q. Do you recall what time of day you left?

A. No. Wait a minute, wait a minute. I'm wrong again, I'm wrong again. I'm sorry. I was in San Diego on Monday, the 11th, and I was in San Francisco on Tuesday, the 12th, and I—
THE COURT: Are you talking about May of '73?
THE WITNESS: No, I'm talking about June, sir.
THE COURT: Very well.
THE WITNESS: And I flew back to New York from San Francisco, so I was here only the Saturday and the Sunday, Saturday the 9th and Sunday the 10th.
Q. BY MR. SMALTZ: When was the next time you came back to Phoenix?
A. Saturday the 16th.
Q. Did you meet with the Government representative?
A. Yes.
Q. Same procedure?
A. Yes.
Q. Same questions, answers, read-backs, notes, whole bit?
A. Yes, sir.
Q. How long were you in conference with the Government representative on the 16th?
A. Well, I have a recollection of arriving at the Federal Building a little after 1:00 o'clock. I think we met until 5 or 6.
Q. How long on the 17th?
A. From about 11 to 5 or so.
Q. When was the next time that you met with Government representatives after the 17th?
A. I have met with them during portions of each day since.
Q. Did they go over your proposed testimony with you?
A. Pardon me?
Q. Did they go over your proposed testimony with you?
MR. LEBOWITZ: Objection to the "closed testimony."
MR. SMALTZ: I said "proposed."
Q. Did they?
A. Yes, they went over my testimony with me.
MR. SMALTZ: Your Honor, at this time, under 3500, I move for the—

THE COURT: Aren't these attorney's work product, notes of interviews with witnesses, just like yours are? Denied.

MR. SMALTZ: Your Honor, just a minute. May I make a statement?

THE COURT: We will take a recess at this time, ladies and gentlemen. You may be excused until you are called by the baliff to return.

(Jury withdraws from the courtroom.)

THE COURT: Isn't this attorney's work product, preparation—

MR. SMALTZ: No, sir.

THE COURT: —of a case, that is exempt from discovery?

MR. SMALTZ: But, Your Honor, it's been a long time since I argued a Jencks Act matter, but I recall cases. Whether or not I can put my finger on them, on an incident—

THE COURT: Until you put your finger on one that goes directly to this issue, the motion is denied, pending reopening if you can get me some authority for use of attorney's work product in interviewing a witness, with his impressions, plans, his strategy and the witness' testimony, when you have already got reduced to testimony a statement of the witness, that this attorney's notes in preparation for trial should be discoverable.

MR. SMALTZ: Okay, then, in support of my motion, first of all, may I say this: I know we are all anxious to break, particularly me, but in the first instance, this statement is incomplete of the witness, this statement dated May 11th.

THE COURT: I don't know that it is.

MR. SMALTZ: All right. I want to have it marked as an exhibit for identification in connection with this motion, and I read from here the remarks of the prosecutor who stated it was his specific intention to complete—to follow through an examination of this witness but on an off-the-record basis.

Now, when you have that situation where you start with and you have the attorney reading back the notes

to the witness, to see if they are correct or not, Your Honor, I believe the Jencks Act comes into play, but I will try and find a case.

THE COURT: You find a case and we will take it up then.

MR. SMALTZ: In the meantime, may this be marked as Exhibit 1A?

THE COURT: You may have it marked, because you are going to be using it for impeachment. It may be marked as an exhibit.

THE REPORTER: Is that Exhibit 1A?

THE CLERK: It is motion exhibit A.

(Defendant's Motion Exhibit A marked for identification.

(Recess.

(Further proceedings in open court, in the presence of the full jury, one alternate, the defendant and all counsel:)

Q. BY MR. SMALTZ: Now, sir, as part of that offer that you—the deal that you made with the Government, Mr. Newman, it was provided, was it not, that Edwin S. Newman shall, after conviction of the codefendant, Philip J. Goldberg and upon the exercise of discretion to be held for all purposes by the office of the United States Attorney, enter a plea to one count of the indictment, whereupon the U.S. shall recommend disposition of probation as to Edwin S. Newman and shall dismiss all remaining counts in the indictment, is that correct?

A. Yes, sir.

Q. So, essentially you are going to enter a plea to one count, is that right?

A. That is correct.

Q. However, in the event the Government is so disposed, they will still let you plead to a misdemeanor?

A. There was no—not one scintilla of indication of any such exercise of discretion on the Government's part.

Q. But that is what you are hoping for, isn't it?

A. I'm hopeful but I have no basis for that hope.

Q. Now, the problem is, if you are convicted of a felony, the New York State Bar will commence proceedings against you to revoke your certificate to practice law in New York; that is a fact, is it not?

A. That is correct.

Q. And that certificate to practice law is of paramount interest to you, is that correct?

A. Yes.

Q. And did you discuss with either your counsel or with either of the prosecutors your ability to enter a plea of nolo contendere to that one count of the indictment?

A. I don't believe that was discussed, sir. I believe it was specifically stipulated as a plea of guilty.

Q. Although the agreement doesn't say what type of plea, isn't that a fact?

A. My understanding was that it was a plea of guilty that would be expected of me.

Q. Did you ever discuss with your counsel the possibility of entering a plea of nolo contendere?

A. Not in the context of the May 11th agreement. We had talked about it months before, between ourselves.

Q. What is the difference between a nolo contendere plea and a plea of guilty so far as state bar proceedings are concerned?

A. I wasn't aware that there was any difference.

Q. Isn't it a fact a nolo plea, the state bar can't use your plea against you; that a guilty plea, they can?

A. I repeat, sir, as far as I know, there is no difference.

MR. SMALTZ: Can I have that answer read back?

(Last answer read.)

Q. You don't know the difference between a nolo plea and a plea of guilty?

A. I know the difference, sir, but I don't believe that the implications in terms of disbarment are any different if it is one plea or the other.

* * * *

[K240-K242] MR. SMALTZ: Thank you very much (handing folder to clerk).

Now, getting back to the Jencks Act, which we started talking about yesterday afternoon, Your Honor, the objection that has been raised by the Court has been that the materials constitute attorney's work product.

I don't know how your Honor could make that observation unless you personally inspect whatever documents or notes the Government counsel have in their possession. Now—

THE COURT: These are notes made by a trial attorney in preparation for trial and interviewing a witness, aren't they? Is there any question about that?

MR. SMALTZ: That is as I understand it.

THE COURT: Okay.

MR. SMALTZ: But, Your Honor, the work-product objection, and I do not mean to kick this point to death, but the work-product objection in the civil rules even gives way when there is no other way for the particular evidence to be obtained and it is pertinent to the subject matter under inquiry.

Now, I have not found a case, Your Honor, that said attorney's notes are compellable. I did read Wright and Moore, Federal Practice, this morning at about 2:30, and I note they have a whole section in there and I didn't find any cases that said attorney's work product—or notes taken by an attorney are not compellable. It seems to me—

THE COURT: The question isn't whether they are compellable; the question is are they compellable. Did you find a case that says they are compellable?

MR. SMALTZ: No, sir, but I didn't find one that says they are not. And the Jencks Act—

THE COURT: Tell you what you do, Mr. Smaltz. We are going to go ahead with the jury trial this morning and we are going to be here at least, from what you have both told me, another ten days, and over the weekend you can prepare whatever kind of a memorandum you want to give me on Monday that the Government can respond to Monday afternoon, and I will take a look at it and let's go on with the jury trial this morning.

MR. SMALTZ: Well, all right, but one other—Okay, I'm happy to do that, Your Honor, except would you, at least, consider ordering the Government to make available for your in camera inspection their notes?

THE COURT: I will order the Government to get their notes together and have them available in case an order is made, and I will see your memorandum first.

MR. SMALTZ: All right, sir, thank you. I am ready to go.

(The full jury and one alternate were returned to the courtroom.)

* * * *

[L55-L57]

(Procedure in open court 3:00 p.m., July 2, 1973, in the absence of the jury and in the presence of the defendant, Mr. Smaltz, Mr. Keilp and Mr. Lebowitz:)

THE COURT: Mr. Smaltz, let's take these one at a time, first your motion for production of attorney's notes.

MR. SMALTZ: Yes, sir.

THE COURT: Do you have anything to add to what you filed with the Court, that I have already read?

MR. SMALTZ: No, sir, nothing to add.

THE COURT: Very well, Mr. Lebowitz?

MR. LEBOWITZ: Well, Your Honor, again I will restate that these were merely our notes which reflect substances of conversations, our impressions, certain entries that would be classified as trial strategy. They were not taken down verbatim. They were not shown to the people that we were interviewing. Nobody was asked to sign them in the form of a signed statement, and we feel that it is properly the work product of counsel and we would stand on that.

I don't feel that the defense has really shown any cases where, under such facts in point, the government is obliged to turn that over.

Also I take a look at point two of that motion, and there is a reference to Volume XXI of the transcript, where Newman was questioned extensively about offers of testimony made by him or his counsel, wherein there

is then an allegation that the government would not accept it because that wasn't strong enough.

I submit that a review of the record will show that that was the defendant's characterization in the form of questions and that that has never been established as evidence and, in fact, that is not my recollection of the facts.

THE COURT: Anything else, Mr. Smaltz?

MR. SMALTZ: No, sir.

THE COURT: Very well. I don't believe that the requested production comes either within the letter, spirit, intent or requirement of Rule 16. The motion is denied.

MR. SMALTZ: It was 16 and 3500 and Brady.

THE COURT: I realize—3500 or Brady.

* * * *

[L101-L103] (Proceedings in open court, 9:00 o'clock a.m., July 3, 1973, in the presence of the defendant and all counsel and in the absence of the jury:)

THE COURT: Let the record show the presence of the defendant, all counsel, and the absence of the jury.

MR. SMALTZ: Your Honor, I have a motion I would like to make before the defense begins putting on its case.

I take it, the government has rested—that happened Friday—but I have not heard anything from the United States concerning whether or not any exhibits—any additional exhibits were going to be attempted to be introduced or any exhibits marked for identification and which were either not offered or which were offered and rejected, that were going to be reoffered at this time, so I presume that there are none.

THE COURT: Mr. Lebowitz, I understand you went through with the clerk Friday afternoon.

MR. LEBOWITZ: That is correct, Your Honor. I don't believe there are any additional offerings other than those which have already been admitted into evidence.

MR. SMALTZ: All right, Your Honor. The defense moves at this time, under the principles of Brady versus Maryland, U.S. versus Giglio, and there's another case that fits—Giles versus Maryland, to have the government

produce any evidence at all in its possession which is exculpatory to the defendant or which is favorable to the defendant.

Now, as I told this Court on many occasions, I have no knowledge of what is in the government's files or what is in the government's head. When I say "head", I am referring to the collective heads of their investigators and attorneys who are handling this case.

However, I do know that we have had a lot of witnesses in this case, who have been subject to a lot of influence from the government, give testimony, and to the extent that there are any exculpatory statements or any inconsistent statements the government is aware of with the witnesses' testimony here in this court, that is one item in particular that I respectfully request the Court to turn over to the defendant.

Additionally, all other exculpatory evidence which they have in their possession or evidence which will tend to —which is favorable to the defendant, I also move for.

THE COURT: Mr. Lebowitz?

MR. LEBOWITZ: Your Honor, to my knowledge, we have produced everything that we are aware of. We have offered all things that we intend to offer in our case in chief; that, to my knowledge, counsel has seen everything that we have in our possession.

At the same time, I would like to say that insofar as this is the beginning of the defense case, that the defendant's attorney stated that at the outset of their case, the government would be provided with any physical evidence that they intended to introduce in their case in chief. We have not, as yet, received that.

THE COURT: Do you have in your possession or knowledge any exculpatory evidence—

MR. LEBOWITZ: I do not.

THE COURT: —that has not been given to the defendant?

MR. LEBOWITZ: No, Your Honor, I do not.

THE COURT: Very well. Now, Mr. Smaltz, the Court will accept the government's representation at this time until something further is shown by someone.

* * * *

[N337] EDWIN S. NEWMAN,

recalled as a witness by the government, having been previously duly sworn, resumed the stand and testified further as follows on rebuttal:

DIRECT EXAMINATION

BY MR. LEBOWITZ:

* * * *

[N348-N357] Q. Now, Mr. Newman, Mr. Paradine has testified for the defense in this case, and I would like to ask you if you recall how many meetings there were between Mr. Paradine and Mr. Goldberg during the course of his examination in 1968?

MR. SMALTZ: Your Honor, may that be more particularized as to dates, because subsequently Mr. Paradine became an employee of FSL?

THE COURT: He asked during the period of the examination, which would be prior to the time he went to work for—

MR. SMALTZ: Does that go up to May 31st, '68? Is that the date of the examination report?

MR. LEBOWITZ: I am asking in the course of his examination, where—

THE COURT: What were the dates of the examination, do you remember?

Q. BY MR. LEBOWITZ: How long did the examination last, first of all?

A. My recollection is that the examination commenced the beginning of February of 1968 and that the final examination report was submitted on August 7th, 1968.

Q. Now, during that period of time, how many meetings did Mr. Paradine have with Mr. Goldberg, if you recall, and what were they?

A. Well, from the period February, early February, the beginning of the examination, to about the middle of May, there were perhaps only two or three encounters between Mr. Goldberg and Mr. Paradine.

Q. And after that point in May, what occurred?

A. There was a date—there was a date in May, I

think it was around the 20th of May, that Mr. Paradine went out to Mr. Goldberg's ranch in company with me. We had lunch at the ranch and there was discussion on that occasion.

Q. How long did that meeting last?

A. Well, including the luncheon and some socializing and the like, I would say about two and a half hours.

Q. And after May 20th, what occurred next?

Wait a minute, before you answer that question.

Do you have the guest books?

THE CLERK: Uh-huh.

(Exhibit handed to witness.)

Q. BY MR. LEBOWITZ: Now I show you a page marked at the top as May 20th. Do you see a signature of anyone that you know on there?

A. Yes.

Q. And how many signatures do you see there that you recognize?

A. I see four signatures that I recognize.

Q. Are the signatures of any of the persons who were present at the meeting or who you say were present at that meeting indicated on that sheet?

A. Yes.

Q. Who were they?

A. H. A. Paradine and Charles K. Taylor, as well as myself.

(Mr. Smaltz approaching witness and examining exhibit.)

MR. SMALTZ: Who is that (indicating)?

THE WITNESS: I know the signature but he wasn't present at the meeting.

MR. SMALTZ: Just tell me who it is.

THE WITNESS: S. B. Weiner.

Q. BY MR. LEBOWITZ: Now, Mr. Newman, after May 20th, what occurred next, what further contacts were there?

A. Between Mr. Goldberg and Mr. Paradine?

Q. Yes.

A. Well, I next recollect a conversation between Mr. Goldberg and myself.

MR. SMALTZ: Your Honor, that is not responsive.

THE COURT: That wasn't the question.

MR. LEBOWITZ: I will withdraw the question.

Q. You said you had a conversation between Mr. Goldberg and yourself. When was that?

A. That was around the third week in July, 20th or 21st.

Q. And where was this conversation?

MR. SMALTZ: Your Honor, I object to this. This is improper rebuttal.

THE COURT: Well, I don't know whether it is yet, or not, until I hear the content of it.

Q. BY MR. LEBOWITZ: When was this—Who was present at this conversation and where was it?

A. Mr. Goldberg and myself, I believe it took place at the ranch.

Q. Did you talk with Mr. Paradine at that time?

A. Yes.

Q. And what, if anything was said?

A. Mr. Goldberg said to me that Paradine had been out to the ranch and had told him that the examination report was going to have to be changed, that Frash, the Chief Engineer, had taken the position that certain assets that Paradine had admitted, he would not go along with and that certain liabilities that were not there, he would not go along with, and that Paradine had told him that as a result of the changes he would have to make in the report, the company would wind up impaired by some nine to ten thousand dollars, and he said to me that Paradine was very distressed about this and felt very unhappy but that he had no choice.

MR. LEBOWITZ: One second, Mr. Newman.

Q. Mr. Newman, I show you Government's Exhibit 3B-1 (handing exhibit to witness).

This is Mr. Paradine's report.

I ask you to take a look at page 42A.

A. 42A? There is no 42A.

Q. Well, 42, then.

(Witness handing exhibit to Mr. Lebowitz.)

MR. KEILP: Excuse me, Your Honor. I think counsel is looking for 32A.

MR. LEBOWITZ: 32A? I'm sorry.

Q. (Handing exhibit to witness) Now, what is that, Mr. Goldberg—Mr. Newman, on 32A? What is on 32A, Mr. Newman?

A. It's titled "Analysis of non-admitted assets and related items December 31, 1967."

Q. Now, are any of those items that were disallowed by Mr. Frash listed on that sheet?

MR. SMALTZ: Your Honor, how would the witness know that?

MR. LEBOWITZ: If he doesn't know, he can answer the question.

MR. SMALTZ: He is relying on a supposed conversation that was hearsay, in the first instance, if in fact, it ever occurred.

MR. LEBOWITZ: It's not hearsay when he was talking with the defendant.

MR. SMALTZ: It certainly is. It's an exception to the hearsay rule but it's still hearsay.

THE COURT: I don't know how he is going to answer this, from the foundation you have laid so far, as to what was listed or not listed in there, if there isn't some indication he was told what was going to come off.

Q. BY MR. LEBOWITZ: All right, Mr. Newman, did you have occasion to learn what particular assets were not admitted, what particular liabilities were added?

A. Yes, I did.

Q. And when did you learn that?

MR. SMALTZ: Object to his learning it. The report speaks for itself. We have stipulated it could come into evidence.

THE COURT: I think also you have in evidence the final report, don't you?

MR. LEBOWITZ: That is the final report, yes.

THE COURT: All right. Where is the preliminary report that was changed?

MR. LEBOWITZ: Your Honor, I believe that in the final report, it shows what was specifically not admitted.

THE COURT: Well, why don't you take the final report, then? Is that shown in there?

MR. LEBOWITZ: Yes.

THE COURT: He can read what was not admitted but that doesn't complete your picture.

Q. BY MR. LEBOWITZ: Mr. Newman, what was not admitted?

A. Shall I read all of the items?

Q. Yes.

A. "Furniture and equipment $14,521.04; agents' balances, net, $8,483.87; cash advanced to officers, et cetera, $3,843.02; loans on personal security, $3,821.91; premium notes in excess of net value, $40,380; refundable deposits, $610; amounts due from affiliated company, $15,740.06; amounts due from re-insurers, $131,888.12."

Q. Now, Mr. Newman, that last entry that you said, "amounts due from re-insurers", what was that?

A. That was a note due from the National Trust Life Insurance Company of Florida.

Q. Now, what, if anything, do you know about that particular entry?

MR. SMALTZ: I object to that type of question.

MR. LEBOWITZ: Your Honor, this has already been testified to.

THE COURT: What kind of a question is "What do you know about that entry?" Where—where's the relevance?

MR. LEBOWITZ: All right.

Q. Is this one of the specific items that was disallowed by the Department of Insurance?

A. Yes.

Q. And that was for how much money?

A. $131,888.12.

Q. Now, Mr. Newman, there's one other entry on there, "Agents' credit balances." Was that something which had not been admitted prior to 1967?

A. It had never been carried as an admitted asset.

Q. Now, Mr. Newman, would you please turn to page 50 of this report.

Now, Mr. Newman, what's the title on that particular page? I can't see it. Mine's stapled up.

A. "Policy and Contract Claims—Life."

Q. Now, you have stated that certain liabilities had

been added. Are any of those liabilities present on this page?

A. Yes, sir.

Q. And what is that?

MR. SMALTZ: I don't understand that preceding question, that certain liabilities have been added. May I come to the bench and show you the report that this witness read from? In fact, he misread from it.

(Mr. Smaltz approaches the bench.)

MR. SMALTZ: Look at this.

THE COURT: Just a minute. Do you want a reporter?

MR. LEBOWITZ: Your Honor, I am going to object to counsel's—

THE COURT: Wait a minute, wait a minute—

MR. LEBOWITZ: —declarations.

THE COURT: Wait a minute.

AT THE BENCH, OUTSIDE THE HEARING OF THE JURY.

* * * *

[N361-N367]

WITHIN THE HEARING OF THE JURY:

Q. BY MR. LEBOWITZ: Mr. Newman, referring you to page 50, would you please read the last paragraph on that page?

A. "In the 1967 annual statement, the company had claimed $187,667.15 deduction from this liability as being due from National Trust Life Insurance Company of Florida under provisions of a reinsurance agreement whereby the company takes the position it has ceded 99.9 percent of nearly all its assumed group life insurance business.

"The details and involvement of that particular agreement were referred to in an earlier section of this report captioned 'Amounts Due From Reinsurance.'

"In view of the fact that the agreement and responsibilities of the parties involved is presently in litigation and in accordance with conservative standard accounting

procedures applicable to a life insurance company, the examiners have prepared the December 31, 1967 financial statement and supporting exhibits that are included in this examination report without regard to the amount of $197,667.15."

Q. Now, Mr. Newman, do you know whether or not this was the liability that Mr. Paradine was directed to include within his report?

A. Yes.

Q. All right. Mr. Newman, do you know whether or not FSL ever collected that $187,000?

MR. SMALTZ: Your Honor, that's irrelevant.

THE COURT: It's immaterial and irrelevant in this case whether he ever collected it or not.

Q. BY MR. LEBOWITZ: You said that this particular report was concluded, I think you said, on August 7th. How do you know that, sir?

A. I recollect that the—that the order of suspension issued on October 16 recites the dates of various documents reaching the department.

Q. Now, Mr. Newman, do you recall, after you had this conversation with Mr. Goldberg—which you said was when, in July?

A. About the third week in July.

Q. Did you have occasion to see Mr. Paradine after that?

A. Yes.

Q. And when was the next time after July?

A. I saw Mr. Paradine on or about the day that the report was delivered to the department.

Q. Where is this?

A. At the United Bank Building—not the United Bank, the TowneHouse Towers offices.

Q. And did you have a conversation with Mr. Paradine at that time?

A. Yes, I did.

Q. Who was present?

A. Just Mr. Paradine and myself.

MR. SMALTZ: Your Honor, the last time when I objected to this type of conversation, you allowed it only because it was supposedly conversations that occurred between Mr. Goldberg and Mr. Paradine between the

date the report was started and the date the report was ended, presumably in an attempt to impeach Mr. Paradine.

THE COURT: That would be the sole purpose of this.

MR. SMALTZ: We are past the date when the report was prepared. The examination is concluded.

THE COURT: The only thing I can assume is, and it better be true, that this is solely for purposes of impeaching the testimony of Mr. Paradine to something that he stated.

MR. LEBOWITZ: It is.

THE COURT: All right.

Q. BY MR. LEBOWITZ: Do you recall the nature of that conversation with Mr. Paradine at that time?

A. Yes, at that time Mr. Paradine himself delivered the examination report to the company and he said to me, "You know, you have a right of a hearing on this report and I suggest to you that you formally advise the department that you do want a hearing."

Q. Now, did you have any further conversations with Mr. Paradine after this day on this subject?

A. Yes.

Q. Do you recall the next one?

A. Several conversations.

Q. Do you recall the next time you talked to him?

MR. SMALTZ: I still don't see where we're going, Your Honor.

MR. LEBOWITZ: Well, Your Honor—

MR. SMALTZ: I object.

THE COURT: Come up here.

AT THE BENCH, OUTSIDE THE HEARING OF THE JURY, MR. LEBOWITZ, MR. KEILP AND MR. SMALTZ ATTENDING:

THE COURT: What testimony of Paradine's are you trying to impeach?

MR. LEBOWITZ: All right. I asked Mr. Paradine, did you ever tell Mr. Newman or Mr. Goldberg how they should prepare for these hearings. He told them that they should make it informal. They shouldn't appear

with an attorney. He told them how they should prepare a brief. He assisted and gave advice.

THE COURT: What are you going to get out of Newman?

MR. LEBOWITZ: We will get out of him the fact the things that he told them on how to approach this hearing, how to prepare a brief, how they should conduct themselves.

THE COURT: How is that impeachment? This is what Paradine—

MR. LEBOWITZ: These are the things that I asked him and he denied them.

MR. SMALTZ: The only thing Paradine was asked is the question, "Did you prepare that affidavit that Newman submitted?"

MR. LEBOWITZ: No, sir, that's not the only question.

THE COURT: Have you got the record over there?

MR. KEILP: He was asked if he ever suggested—

THE COURT: Have you got the record over there marked where Paradine testifies?

MR. LEBOWITZ: I don't have it up here, but I can get it. It's downstairs. I will show the Court where I asked him, number one, "Did you tell them that they were not to appear without attorneys?" and he said "No, I never said anything like that."

I said, "Didn't you give them advice on how to conduct themselves during this hearing?" He said, "I never did that." He denied all of these.

MR. SMALTZ: Assuming that that's so, I don't remember that. I remember Paradine saying—

THE COURT: I remember him talking about some of it.

MR. LEBOWITZ: It is impeaching him because it goes to the truthfulness of his testimony, his credibility. Isn't that always an issue when you have conflicting witnesses testifying in conflicting things?

MR. SMALTZ: Fine. Then let's have the government show me in the transcript where that was allegedly said. They are just going to walk over the lot with this guy. They will bring him back, wine him up—

THE COURT: Take it up after the recess when you have got a copy of the transcript, to make sure it's in there.

WITHIN THE HEARING OF THE JURY:

Q. BY MR. LEBOWITZ: Mr. Newman, we will come back to that in a minute.

* * * *

[N423-N424] Q. [BY MR. SMALTZ] Since the last time I saw you, how much time have you spent up in the U.S. Attorney's Office?

MR. LEBOWITZ: Your Honor, I don't see that that's really relevant to this inquiry.

THE COURT: He may answer.

A. Since the last time you saw me, I believe I returned to Phoenix on the 4th of July.

Q. BY MR. SMALTZ: Spent all day the 4th up there?

A. Good part of it, five, six hours.

I have been at the government attorneys' offices on an average of five hours a day since—since my return on the 4th of July.

Q. Today is what day, the 9th?

A. Today's the 11th. It's a week ago.

Q. Five hours a day since then?

A. About that.

* * * *

[C.T. 546]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-70-517 Phx.

[Filed Oct. 5, 3:50 PM '73]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP J. GOLDBERG, DEFENDANT

JUDGMENT AND COMMITMENT

On this 5th day of October, 1973, at Phoenix, Arizona came the Attorney for the Government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 18, Section 1341, United States Code (Mail Fraud), as charged in counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, and 16.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on each of said counts and said counts to run concurrently. IT IS FURTHER ORDERED that the defendant pay a fine in the amount of $1,000 on each of said counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 16, making a total of $14,000.00.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ [Illegible]
United States District Judge

[C.T. 446]

DONALD C. SMALTZ
1 Wilshire Bldg., Suite 2420
Los Angeles, California 90017

[Filed Oct. 5, 1973 W. J. Furstenau, Clerk, United States District Court for the District of Arizona. By R. Womack, Deputy Clerk]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 70-517 PHX-WPC

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP J. GOLDBERG, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that Philip J. Goldberg, Defendant in the above captioned cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 5th day of October, 1973.

Oct. 5/73

/s/ Donald C. Smaltz
DONALD C. SMALTZ
Attorney for Defendant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1023

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

PHILIP J. GOLDBERG, DEFENDANT-APPELLANT

[December 18, 1974]

On Appeal from the United States District Court
for the District of Arizona

MEMORANDUM

Before: KOELSCH and KILKENNY, Circuit Judges and SWEIGERT, District Judge *

Appellant Goldberg appeals from a judgment imposed by the Court after his conviction by a jury of fourteen counts of an indictment charging violation of 18 U.S.C. § 1341—use of the mail to defraud. He was sentenced to a term of two years imprisonment on each of the 14 counts, the sentences to be served concurrently, and a fine of $1,000 on each count.

Each of the 14 counts charged appellant with a separate transactional instance of use of the mail for the purpose of executing a scheme and artifice to defraud. The scheme alleged in each count was in substance and to the effect that appellant, as President of Financial Security Life Insurance Company, caused the company to issue to various individuals certain so-called single

* The Honorable William T. Sweigert, Senior United States District Judge for the Northern District of California, sitting by designation.

premium annuity policies, purporting to be premium fully prepaid, with a view to their use by the annuitant as collateral for borrowing money from banks and other lending sources; that when lenders, considering such loans, inquired of Financial Security Life Insurance Company (FSL) concerning the status of such policies, appellant caused certain false statements to be made, i.e., that the premiums were paid in full—whereas no payments except interest payments had been made on certain promissory notes accepted by FSL as premium payment; that there were no liens or encumbrances of record against the policies offered as collateral—whereas certain reservations of benefits and proceeds riders reduced the policies to virtually zero; that the face amount of the policy was the cash surrender value that would be paid the annuitant after the date due specified in the policy whereas said policies were worthless; that appellant concealed and withheld from the lenders the material facts that promissory notes had been accepted by FSL in payment of premiums and that the policies were subject to riders providing that the policies would be reduced by the total amount unpaid; that when the policies issued by FSL were accepted by lenders as collateral and presented for payment the lenders would then be informed by appellant that no amounts were payable because no payments had been made on the promissory notes.

It was contended by appellant at the trial that the policies in question had been properly issued, and that the false statements to the lenders "were believed to be correct" and that appellant "had relied upon the advice of his various attorneys." (App. Opp. Brief, p. 6)

Appellant makes no contention that the evidence, if believed by the jury, would be insufficient to support findings adverse to appellant on those issues of fact.

Appellant asserts insufficiency of the evidence only with respect to the use of the mails element of the case, i.e., (1) the implied finding that the letters referenced in Counts 10 and 12 had been placed in the mail, and (2) the implied finding that the mailings referenced in Counts 2, 12, 16, 4 and 14 were for the purpose of executing, within the meaning of Section 1341, the scheme alleged in those Counts.

Other grounds for reversal presented by appellant have to do with claimed errors of the trial judge.

RE INSUFFICENCY OF THE EVIDENCE

1. *Counts 10 and 12—re Proof of Mailing*

It is well established that one "causes" the mails to be used, within the meaning of Section 1341, when he does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen. *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954).

Appellant here does not contend in his brief that the letters referenced in the above counts, if mailed, were not so "caused" to be mailed by him; he contends only that there is insufficient evidence to support the finding that the letters referenced in Counts 10 and 12 were actually placed in the mail.

The mailing of the letter referenced in Count 10, Exhibit 13A, a letter of December 31, 1968, allegedly mailed by one Hoover of Western General Corporation to FSL, was supported only by the testimony of Newman (of FSL) to the effect that he received the letter in the mail. However, Hoover could not recall whether he had mailed that letter to Newman or had delivered it to one Kenslow for delivery to Newman. There is no evidence concerning Hoover's customary practice concerning how letters of this kind were transmitted. The evidence shows, however, that shortly after the date of the letter Hoover and Kenslow did come to Phoenix where Kenslow personally presented the annuity policies referred to in the letter, along with other documents, to Newman. Although a copy of the letter appeared in FSL files, no receipt stamp appears on its face; Newman's testimony about receiving the letter "in the mail" was qualified by adding: "as far as I can determine."

The letter referenced in Count 12 was a letter dated January 24, 1968 (Ex. 10B), allegedly mailed by Newman to FSL to one Skillman of American Mortgage Company. Exhibit 10B was an unsigned copy of the letter. There is no testimony from anyone at FSL con-

cerning the mailing of the letter nor any testimony concerning the custom and practice relating to the mailing of such letters. Newman merely testified that Exhibit 10B was a copy of a letter of January 24, 1969 from him to Skillman. Neither the original of the letter nor the envelope was produced at trial. The copy was received in evidence upon testimony of Skillman that he "received" the letter in the mail.

It is settled that use of the mails, like most other facts, need not be established by direct evidence; it may be established by circumstantial evidence provided, of course, that the circumstances are such as to reasonably support an inference of mailing beyond reasonable doubt. *United States* v. *Fassoulis*, 445 F.2d 13, 17 (2d Cir. 1971). Appellant contends, however, that there is no such evidence of the mailings referenced in Counts 10 and 12.

An examination of cases discussing the standards and guidelines for proof of the mailing requirement of Section 1341 (*United States* v. *Fassoulis*, supra; *United States* v. *Leathers*, 135 F.2d 507 (2d Cir. 1943); *Whealton* v. *United States*, 113 F.2d 710, 713 (1940); *United States* v. *Baker*, 50 F.2d 122 (2d Cir. 1931); *Mackett* v. *United States*, 90 F.2d 462 (7th Cir. 1937); *Freeman* v. *United States*, 20 F.2d 748 (3d Cir. 1927), leads us to the conclusion that proof of mailing the letter referenced in Count 10 falls far short of the guidelines set by even the most liberal of these cases, e.g., *Fassoulis*, *Leathers*, supra) and is insufficient within the meaning of such cases as *Baker*, supra; *Freeman*, supra; *Mackett*, supra and *Whealton*, supra.

We are of the opinion, however, that within the meaning of *United States* v. *Leathers*, *supra*, the evidence is sufficient to support the implied finding of the mailing of the letter (Ex. 10B) referenced in Count 12.

2. *Re Counts 2, 12, 16, 4 and 14—re Proof that Mailing in Execution of the Schemes Charged*

Again we note that appellant makes no contention that the letters referenced in the above counts, if they were mailed in execution of the alleged scheme, would not have been "caused" to be mailed by appellant within

the meaning of Section 1341. Defendant argues only that the letters were not "for the purpose of executing the scheme" within the meaning of the statute.

Since we have already determined that the convictions on Count 10 must be reversed for failure to prove mailing of the letter referenced in that count, it is unecessary to consider defendant's further contention that the letters were not in execution of the scheme.

The letter referenced in Count 2, Exhibit 4A, was a letter dated July 31, 1968, from one Tucker to FSL, relating to single premium life insurances policies—not single premium annuities. Appellant contends that, therefore, it could not be considered to be in furtherance of the scheme charged in Count 2 which refers only to annuities.

The evidence is to the effect that in the summer of 1968 one Tucker, a New York financial broker, had called FSL to discuss mortgage loan commitments and later to discuss the issuance of single premium life insurance policies (not annuity policies). Eventually, Tucker visited FSL at Phoenix and discussed single premium life insurance policies with defendant. It was not, however, until near the end of August, 1968, i.e., after the date of his July 31, 1968 letter, that Tucker for the first time discussed with defendant the possibilities of using single premium annuities.

We find no merit in appellant's narrow point; the correspondence in question led to the ultimate use of annuity policies. Although the July 31, 1968 letter refers only to life insurance policies (as distinguished from annuity policies), Tucker's subsequent contribution of ideas concerning annuity policies stemmed from that earlier correspondence and the letter, therefore, can be deemed to have been in that sense in furtherance of the scheme charged.

The letter referenced in Count 16, Exhibit 5Y, was a letter dated May 6, 1969, from Royal National Bank to FSL demanding that FSL make payment to the bank of certain annuities under a policy which the bank had previously accepted as collateral for a loan. The evidence is to the effect that the letter, making demand for payment by FSL, was mailed 18 months after the bank had actually accepted the policies as collateral.

Appellant contends, citing and relying on *United States* v. *Maze*, 414 U.S. 395 (1974); *Parr* v. *United States*, 363 U.S. 370 (1960); *Kann* v. *United States*, 323 U.S. 88 (1944), that the scheme had reached fruition when the bank accepted the policies as collateral and that, therefore, the letter could not be considered to have been in execution of the scheme charged in Count 16.

In *Maze*, supra, the letter in question was mailed to a bank by the true owner of the bank's credit card requesting adjustment of his account after *Maze*, the defendant in that case, had stolen and misused the credit card to obtain lodging at various motels. The court held (p. 402) that Maze's scheme had already reached fruition when he checked out of the motels and that there was no indication that the success of his scheme depended in any way on the adjustment of loss between his victims.

In the present case, however, the letter in question was from the bank which had been victimized by its acceptance of the policy as collateral, but it was written, not to another victim (as in *Maze*), but to the defrauder, himself, seeking, not merely to adjust a discovered loss, but to realize on the policy collateral, something that appellant herein would reasonably have expected to happen at some time during the period the bank held the collateral in reliance upon appellant's false representation.

Whether a mailing is in furtherance of a scheme does not depend upon mechanical determination of when the mailing occurs but upon a determination of the contribution made by the mailing to the scheme's success. *United States* v. *Klem*, 416 F.2d 346, 350 (9th Cir. 1969).

We are of the opinion, therefore, that here, appellant's scheme had not reached fruition, as in *Maze*, but was in effect continuing up to the time of writing the letter (Ex. 5Y) the mailing of which was caused by appellant and was also in this sense in execution of the scheme.

The letter referenced in Count 4, Exhibit 8B, was a letter dated December 17, 1968, from Newman of FSL to Herman of First National Bank of Mason City in response to a letter inquiry from Herman, dated December 9, 1968, concerning an application of one Darden for a loan based on an FSL policy as collateral.

The evidence is to the effect that on the following day, December 10th (six days before FSL mailed the Count 4 referenced letter), Herman decided not to make the loan to Darden. Appellant contends that, therefore, the letter could not be considered as being in furtherance of the scheme charged in Count 4. (See App. Brief p. 85-101).

We cannot agree. The referenced letter (Ex. 8B) was obviously intended to further the scheme and the mere fact that appellant did not know that the bank had already decided to reject the loan for other reasons does not excuse appellant.

The letter referenced in Count 11, Exhibit 16C, was a letter dated February 7, 1969, from one Friedman of National Bank of North America to FSL inquiring concerning certain FSL policies presented to the bank on the previous day by one Kenslow as further collateral for loans which the bank had already made to Kenslow on January 7, 1969 and January 15, 1969 on the basis, according to defendant, of Kenslow's note rather than on the basis of the FSL policy collateral. Appellant contends that, therefore, Exhibit 16C could not be considered as in execution of the scheme alleged in Count 11; appellant makes a similar contention as to the letter referenced in Count 14, Exhibit 16F, a letter from Newman of FSL to National Bank of North America, dated March 21, 1969, responding to the Exhibit 16C letter referenced in Count 11.

We disagree. Obviously, the sending of Exhibit 16C by the bank indicates that the bank was relying, to some extent at least, on the further security of the policies. Appellant's response to the bank (Ex. 14) was, therefore, in furtherance of appellant's scheme.

RE ERRORS OF LAW

Defendant contends that the trial court erroneously refused to dismiss the indictment upon the grounds that it had been returned after only a one-hour grand jury hearing on other variously asserted charges of "perversion" by the government of the grand jury proceed-

ings. We are satisfied that this ruling of the trial court did not constitute clear prejudicial error. See *United States* v. *Costello*, 350 U.S. 359 (1956).

Defendant contends that the trial court erroneously refused to order the government either to refrain from using or to deliver to defendant a copy of a so-called "jury book"—the United States Attorney's notes concerning the voting record and any known idiosyneracies of jurors on the panel. We are satisfied that this refusal did not constitute prejudicial error even under the circumstances argued by defendant. See *Hamer* v. *United States*, 259 F.2d 274 (9th Cir. 1958).

Defendant further contends that the trial judge erroneously refused to order government disclosure of certain notes taken by Assistant United States Attorneys reflecting the substance of, but not verbatim, discussions with government witness Newman. These notes were taken in discussions with Newman after Newman's written statement of May 11, 1973 which was disclosed to defendant. Apart from the question whether such notes were exempt from the Jencks Act (18 U.S.C. § 3500) as "work product," they were not statements of the defendant within the meaning of § 3500(e). We find no clear, prejudicial error.

Defendant further contends that the trial court erred in permitting cross-examination of the defendant on matters which, defendant asserts, were beyond the scope of direct examination.

Considered in the light of the length and tenor of defendant's direct examination to the effect that his own conduct was free of any intent to defraud and that he was unaware of any improprieties and that he was victimized by his reliance on others, we cannot say that the cross-examination which was allowed by the trial court to refute defendant's testimony, was unreasonable or in excess of the bounds of cross-examination. We find no clear, prejudicial error.

Defendant further contends that the trial court erred in refusing to allow one of defendant's attorneys (Smaltz) to testify concerning an alleged government threat to indict a prospective defense witness (Schwartz) if he testified.

The trial court hearing on this point, held outside the presence of the jury, shows an offer of proof concerning, not a government threat against Schwartz, but only a government statement to defendant's counsel (Smaltz) to the effect that, if defendant intended to call Schwartz, he (defendant's counsel) should inform Schwartz of his Fifth Amendment rights because, if Schwartz testified, there was a considerable possibility he might be indicted; that defendant's counsel did so inform Schwartz; that, upon suggestion of the court, Schwartz was then granted immunity and did testify.

An examination of the record on this point satisfies the court that there was no abuse of discretion on the part of the trial court. We find no clear, prejudicial error.

Defendant contends that the trial court erroneously refused to allow one of the defendant's attorneys (Nazarian) to testify concerning claimed inconsistent statements of the government's witness (Skillman) to the effect that Skillman had stated to Nazarian during an interview with Skillman at the Holiday Inn in Phoenix just prior to the Goldberg trial, that he (Skillman) had informed an Assistant United States Attorney, that, if he (Skillman) was to testify for the government, he wanted comfortable accommodations and would not stay in a county jail—a statement which Skillman had on cross-examination denied making.

Considering the circumstances shown by the record we are of the opinion that the trial court's refusal to allow Nazarian, who had participated as defendant's counsel, to testify to the claimed inconsistent statements of Skillman was not in abuse of discretion. Skillman had been cross-examined by defendant's counsel on these statements allegedly made to Nazarian, yet Nazarian continued as co-counsel for two to three weeks thereafter without either withdrawing or indicating to the government that he was a potential witness in the case. We find no clear, prejudicial error.

Defendant further contends that during the government's rebuttal argument to the jury, government counsel made statements of fact, referring to Stillman's testimony above referred to but not shown by any evidence,

to the effect that witnesses brought by the government from federal penitentiaries to testify, normally stay at the closest federally approved detention center, normally a jail within a city, but that Phoenix did not have such a federally approved detention center and the closest was at Florence—60 miles away.

Defendant contends that this statement was, not only outside the evidence, but also false. Defendant attaches to his brief a copy of a contract between the Bureau of Prisons and Maricopa County providing for detention of federal prisoners at the Maricopa County Jail. Defendant's counsel, conceding that no objection was made at trial to this claimed improper argument, explains that he did not know the true state of affairs until after the trial.

Appellee concedes that its remark concerning the nonexistence of a federally approved jail near Phoenix was erroneously but innocently made and, further, that its remark concerning safety was made in a good faith attempt to indicate that prisoners who are called to testify for the government are sometimes kept apart from other prisoners in the interest of protecting the witness, not from the defendant in the case, but from other prisoners. Considering all the circumstances shown by the record, we are satisfied that the remarks of government counsel on these matters, which was quite collateral to the main issues, were not so out of line as to deprive defendant of a fair trial. We find no clear, prejudicial error.

Defendant contends that the trial court erroneously refused during the cross-examination of government witness, Newman, to make an order requiring the government to produce all its records of conversations between attorneys for Newman and attorneys for the government relating to the making of a written plea bargaining agreement with Newman that had been reduced to writing and disclosed to counsel for appellant.

Defendant argues that, although the written agreement was to the effect that Newman was to plead guilty to one count of the indictment and although Newman admitted to that effect on the stand, the government, after

the Goldberg trial, actually permitted Newman to plead to new misdemeanor charges and dismissed the felony indictment charges.

On this point we are satisfied that the government's decision, made afer the trial, to go somewhat further than the written agreement provided, did not amount to a failure to fully disclose a bargaining agreement with the witness Newman. Even if it did, it would not have prejudiced defendant who had been timely informed of the written bargaining agreement for recommended probation and given full opportunity to cross-examine Newman concerning promises. See, *United States* v. *Polizzi*, 500 F.2d 856 (9th Cir. 1974). We find no clear, prejudicial error.

For the reasons above set forth the judgment of the District Court is affirmed except that the judgment on Count 10 is reversed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1023

(Dc-70-517WPF)

[Filed Feb. 5, 1975, U.S. Court of Appeals]

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

PHILIP J. GOLDBERG, DEFENDANT-APPELLANT

Before: KOELSCH and KILKENNY, Circuit Judges, and SWEIGERT,* District Judge.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING IN BANC

The members of the panel voted unanimously to deny the petition for panel rehearing. Judge Koelsch voted against a rehearing in banc, and Judges Kilkenny and Sweigert recommended against such a rehearing.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. F. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

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* The Honorable William T. Sweigert, United States District Judge for the Northern District of California, sitting by designation.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-6293

PHILIP J. GOLDBERG, PETITIONER

v.

UNITED STATES

On petition for a writ of Certiorari to the United States Court of Appeals for the

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 8 presented by the petition which reads as follows:

"Whether 18 U.S.C. § 3500, the Jencks Act, contains an 'attorney's work product exception'; and whether a Government attorney's notes of conversations with the key Government witness, to whom the prosecutors read back their notes from time to time where the witness corrected same, which notes were prepared 'only after lengthy conversations had occurred and a mutual understanding of the factual situation' had been reached, if not compellable under the Jencks Act, and compellable under the doctrine of Brady v. Maryland."

June 16, 1975

Mr. Justice Douglas took no part in the consideration or decision of this motion and petition.

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